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Supreme Court, U.S.
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No. 08-09-90

IN THE

Supreme Court of the United States

KATHLEEN PIERCE; MATTHEW MORGAN,

Petitioners,

v.

SAN DIEGO UNIFIED PORT DISTRICT,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Lawrence W. Stirling*
Gregory M. Garrison
Amelia A. McDermott
TEEPLE HALL, LLP
9255 Towne Centre Drive, Suite 500
San Diego, California 92121
Telephone: (619) 622-7878

* *Counsel of Record* *Attorneys for Petitioners*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTIONS PRESENTED

The Ninth Circuit affirmed the District Court's orders granting respondent San Diego Port District's motions for summary judgment against petitioners Kathleen Pierce and Matthew Morgan. In so doing, the Ninth Circuit erroneously ruled that Petitioners' due process claim fails as a matter of law. However, the Ninth Circuit's ruling completely ignores the fact that the District Court erred in its interpretation of California Harbors and Navigation Code section 500 *et seq.* and San Diego Unified Port District Code sections 4.35 and 8.25. This error resulted in a violation of Petitioners' right to due process.

One Question is presented:

1. Whether a conflict in statutory law resulted in a violation of Petitioners' due process rights.

LIST OF PARTIES

The parties to the proceeding below are identified in the caption of the case.

CORPORATE DISCLOSURE STATEMENT

The San Diego Unified Port District is a public agency organized and existing under the provisions of the San Diego Unified Port District Act.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. A) is not reported but is available electronically at 2009 WL 1069292. The final judgment of the United States District Court for the Southern District of California is unpublished and reproduced at Pet. App. G. The unpublished decisions of the district court are transcribed and reproduced at Pet. App. B through F.

STATEMENT OF JURISDICTION

The Ninth Circuit's opinion was rendered on April 22, 2009. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . ." U.S. CONST. amend XIV, § 1.

Pursuant to this Court's Rule 14.1(f), the provisions of the San Diego Unified Port District Code ("UPD") and California Harbors and Navigation Code ("HNC") involved in this case, including UPD §§ 4.35 and 8.25 and HNC §§ 504, 522, and 526 are set forth at Pet. App. G, ***-***.

STATEMENT OF THE CASE

Background of Facts and Issues

The underlying dispute in this matter involves a two story floating vessel nicknamed "the Castle", which was located in the San Diego Bay. At some time after completion, Petitioner Morgan became the owner of the Castle, while Petitioner Pierce held a security interest in the vessel.

For years, the Castle was used by a number of groups, mostly comprised of minorities. During this time, several lawsuits were filed by Respondent to remove "the Castle" from the Bay, including two suits on July 29, 1992 for permanent injunction and declaratory relief. Before those cases proceeded to trial, however, a settlement was reached between then Port Director Don Nay and the then owner of "the Castle" by which Respondent agreed to dismiss its suit in exchange for "the Castle" being moved to the A-8 anchorage in central San Diego Bay.

Due to the A-8 anchorage's poor location, however, it was necessary that "the Castle" be anchored outside of the A-8 boundary limits because heavy winds could push the structure around causing

damage to other boats. As such, another agreement was made between then Port Director Don Nay and the then-owner of "the Castle" whereby "the Castle" would be anchored a fair distance outside of the A-8 anchorage so that it could swing freely in the event of high winds.

Despite this settlement, on January 22, 2002, Respondent set out to remove "the Castle" from San Diego Bay. To this end, Respondent seized the Castle for violation of UPD Code section 4.35(c)(6), however, no civil injunction was ever filed by the Respondent. At the same time, Respondent also seized a number of Petitioners' smaller vessels that were within the A-8 anchorage. All of these vessels were registered with the DMV.

Petitioners assert in this case that Respondent lacked any authority whatsoever to seize and destroy their vessel commonly known as "The Castle" and clearly failed to follow the procedural guidelines of its own ordinances and those of the HNC as required under the due process clause.

In particular, Petitioners allege that Respondent had no authority to seize and destroy "The Castle" for failing to comply with UPD Code section 4.35 (c)(6). In 2002, at the time of Respondent's seizure and destruction of "The Castle", the only available enforcement process for violation of Section 4.35 was a civil injunction. As such, "The Castle's" seizure and destruction violated Petitioners' due process rights as a matter of law.

In this regard, Respondent violated Petitioners' due process rights by not meeting the procedural prerequisites and then subsequently failing to perform a noticed lien sale of Petitioners' seized vessels under HNC Code sections 504, 522 and 526. As such, Respondent denied Petitioners a final right of redemption of their personal property in violation of their due process rights.

Indeed, Respondent had no authority to summarily destroy Petitioners' property since it failed to follow the procedural guidelines required under UPD Code section 8.25 and HNC sections 504, 522, and 526. Vessels registered with the California Department of Motor Vehicles ("DMV"), such as "The Castle" and Petitioners other seized vessels, should have been offered under a noticed lien sale, not destroyed.

Respondent failed to comply with clear statutorily required procedures for dealing with Petitioners' property under HNC Code section 526. Section 526 requires that any "derelict", "hulk", "unseaworthy" or "abandoned" vessel may only be sold or "otherwise disposed of" subject to certain conditions which were not met. Respondent failed to provide adequate prior notice of seizure of "The Castle" to the legal owners of the vessel. Petitioners never had actual notice of the seizure and destruction of their property. To the end, Respondent also failed to provide any notice of the statutorily required lien sale that should have taken place with respect to Petitioners' property.

Proceedings Before the District Court

After several of Petitioners' vessels were impounded from San Diego Bay and destroyed, Petitioners each separately filed suit against Respondent on January 27, 2003, in the United States District Court for the Southern District of California.

After successive challenges to his original pleading, Petitioner Matthew Morgan filed a Third Amended Complaint ("TAC") on March 10, 2004. Petitioner Kathleen Pierce filed her Second Amended Complaint ("SAC") on November 7, 2003. Respondent answered Pierce's SAC and amended its answer to Morgan's TAC on May 27, 2004, adding counterclaims for the cost of removal and destruction. Petitioners then both answered Respondent's counterclaim on June 8, 2004. Prior to that time, Pierce's second claim had been dismissed by the court.

Thereafter, on September 30, 2004, Respondent filed a motion for summary judgment against Pierce and on October 4, 2004, filed a similar motion against Morgan as to all of Petitioners' claims. Following those motions, on February 2, 2005, the court only dismissed Petitioners' third claim for ordinance invalidity and seventh claim for ordinance unconstitutionality and narrowed the first claim for violation of civil rights, leaving Petitioners' claims of negligence and due process violations against Respondent.

On March 13, 2006, Petitioners' cases were consolidated with each other and with case number 04cv 1695-IEG(AJB), that of plaintiff James Ward ("Ward").

On April 4, 2006, Respondent filed a motion for summary adjudication as to Respondents' due process claims. Respondent's motion was then granted by an order dated July 7, 2006 that was filed by the court on July 10, 2006.

Finally, on August 28, 2006, Respondent filed a motion for judgment on the pleadings, alleging a failure to state a claim for relief as to Petitioners' one remaining claim for negligence. After Petitioners' cases were unconsolidated from that of Ward, the district court granted Respondent's motion on December 6, 2006, treating it as a motion for summary judgment.

At that point, the only remaining issue was Respondent's counterclaim against Petitioners. That counterclaim was determined in another motion for summary judgment filed by Respondent on February 15, 2007 and decided on March 23, 2007 in favor of Respondent. Final judgment in the case was thereafter entered by the court on the same day.

Decisions of the District Court

The district court erred in dismissing Petitioners' action against Respondent due to its interpretation of several statutory provisions, including San Diego Unified Port District Code sections 4.35 and 8.25, and Harbors and Navigation Code section 500, *et seq.*

The result was the dismissal of Petitioners' due process claims, which effectively relieved Respondent of its statutory obligation to prove a violation, notify the known owners, and fulfill any other safeguards before

the unilateral impoundment and destruction of any vessel located in the San Diego Harbor or in the A-8 Anchorage.

The interpretation of the district court was, therefore, contrary to the provisions of the due process clause and was made without reference to evidence demonstrating the intent of Respondent and varying past application of the law.

Decision of the Ninth Circuit

The Ninth Circuit affirmed the district court's orders granting Respondent's motions for summary judgment against Petitioners. In so doing, the Ninth Circuit erroneously ruled that Petitioners' due process claim failed as a matter of law. However, the Ninth Circuit's ruling completely ignores the fact that the district court erred in its interpretation of HNC Code section 500 *et seq.* and UPD sections 4.35 and 8.25. This error resulted in a violation of Petitioners' right to due process.

REASONS FOR ALLOWANCE OF THE WRIT

Petitioners respectfully submit that this Court should grant their petition for writ of certiorari and review the Ninth Circuit Court of Appeal's decision because a compelling reason exists to do so. In particular, the Ninth Circuit sanctioned the rulings of the district court, which so far departed from the accepted and usual course of application of the constitutional right to due process, as to call for an exercise of this Court's supervisory power as follows:

I. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT SANCTIONED THE DISTRICT COURT'S DEPARTURE FROM THE LAW APPLICABLE TO CONSTITUTIONAL DUE PROCESS.

A due process claim "hinges on proof of two elements: 1) a protectable liberty or property interest, and 2) a denial of adequate procedural protections."[*Foss v. Nat '1 Marine Fisheries Serv.*, 161 F.3d 584, 588 (9th Cir. 1998)]. As this Court held in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483- 484 (1986), municipal liability under 42 United States Code section 1983 attaches where a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question. [*Pembaur v. City of Cincinnati*, 475 U.S. 469, 483- 484 (1986)].

In this case, both the district court and the Ninth Circuit found that no violation of Petitioners' due process rights occurred because applicable regulations had been adequately followed. This finding, however, was the result of the court's misinterpretation and misapplication of statutory law, as well as a failure to consider outstanding factual issues.

Indeed, initially the district court expressly found that Respondent is a final decision maker due to its authority to determine whether a vessel is abandoned and its ability to arrange for such vessel's removal and/or destruction under San Diego Port District Code

section 8.25 and California Harbor and Navigation Code section 522. [Pet. App. B and C,]. As a result the district court denied Respondent's initial Motion for Summary Judgment. [Pet. App. B and C].

Thereafter, Respondent filed a subsequent Motion for Summary Adjudication in which it argued that no triable issue of fact existed since notices of the vessels' seizure and opportunity for hearing were sent out but never received by the registered owners of the vessels. Both the district court and the Ninth Circuit erroneously agreed. [Pet. App. A, D].

The orders of both the district court and Ninth Circuit, however, were in error because simply sending a notice in and of itself does not relieve Respondent of any further procedural due process requirements under the law. In fact, Respondent violated its own ordinances and the statutory notice requirements of the Harbors and Navigation Code as shown below. As a result, Respondent violated Petitioners' due process rights under 42 United States Code section 1983, and the instant Petition should be granted.

1. Respondent Violated Petitioner's Due Process Rights Since It Seized and Destroyed "The Castle" for A Violation of UPD § 4.35(c) (6), An Infraction Which Provided A Civil Injunction Remedy As Its Only Means of Enforcement.

On January 29, 2002, Respondent set out to seize "the Castle" for violation of UPD section 435(c)(6). At

the time of the seizure, Section 4.35 (c)(6) prohibited unauthorized anchoring in central San Diego Bay. [Pet. App. G]. However, at the time of the seizure, Section 4.35 's only means for enforcement was a civil injunction. [Pet. App. G].

No civil injunction was undertaken in 2002 by the Respondent as required by law. Instead Respondent simply seized and destroyed "The Castle" in disregard of its own ordinances and procedures, as well as Petitioners' due process rights.

In its Mandate, the Ninth Circuit ruled that Respondent was not required to seek an injunction in order to enforce a violation of UPD section 4.35 because UPD section 8.25 was in existence at the time of the seizure of "the Castle," and section 8.25 did not require Respondent to seek an injunction. [Pet. App. A].

This, however, does nothing to excuse the due process violations which occurred in this case. Indeed, even if Respondent had authority to seize and destroy "The Castle" and Petitioners' other vessels in San Diego Bay under UDP section 8.25 and Harbors and Navigation Code section 500, *et seq.* it still violated Petitioners' due process rights. In particular, the Respondent did not comply with the notice procedure required by UDP section 8.25(a)(5).

UDP section 8.25 gives Respondent authority and sets out the procedural guidelines to remove water craft found in violation of the law. [Pet. App. G, UDP § 8.25]. Section 8.25(a)(4) gives Respondent authority to destroy vessels after notice is given and no owner reclaims the

vessel after thirty days. [Pet. App. G, UDP § 8.25(a)(4)]. However, the applicable section of the Code in this matter is not section 8.25(a)(4). [Pet. App. G, UDP § 8.25(a)(4)].

UDP 8.25(a)(5) is the relevant section as it requires that Harbors and Navigation Code section 500, *et seq.* govern the disposition of any vessel registered with the DMV. [Pet. App. G, UDP § 8.25(a)(5)]. All of Petitioners' seized and destroyed vessels were registered with the DMV as the Ninth Circuit recognizes in its Mandate. [Pet. App. A}.

Section 522 of the Harbors and Navigation Code is entitled "Abandoned hulks within municipal limits; disposition; claim of ownership; fee". Section 522 is the relevant statutory section for this matter since the seized vessels were all registered with the DMV. [Pet. App. G, CA Harbors & Nav. C. § 522]. Respondent violated Petitioners' due process rights by failing to properly dispose of the vessels by way of noticed lien sale.[Pet. App. G, CA Harbors & Nav. C. § 522(b)]. Section 522(b) states:

> "If a registration number appears on the watercraft, the municipal corporation or other public corporation or entity shall send the notice to the last registered owner and the disposition shall be handled as a lien sale under Section 504."

Respondent did not even attempt to comply with Section 504, which sets out the procedural requirements for conducting a lien sale. [Pet. App. G, CA Harbors &

Nav. C. § 504]. In fact, no lien sale was ever conducted. Respondent failed to have an independent appraiser make a value determination of the seized vessels as required by Section 504(a) and it did not make any reference to the specific date of the required lien sale as required by Section 504(d). [Pet. App. G, CA Harbors & Nav. C. § 504(a), (d)]. In fact, Respondent failed in every instance to comply with requirements of Section 504.

Instead Respondent made a final decision, contrary to the law and in violation of Petitioners' due process rights to not conduct a lien sale, but instead to destroy the vessel. Since no lien sale was ever conducted by Respondent, Petitioners' last opportunity at redemption was lost and their due process rights were violated as a matter of law.

2. Respondent Failed to Comply with the Procedural Requirements of Harbors and Navigation Code Section 526 in Violation of Petitioners' Due Process Rights.

California Harbors and Navigation Code section 526 must be read in conjunction with Section 522 as it sets out the procedural requirements necessary before disposition of a vessel. [Pet. App. G, CA Harbors & Nav. C. §§ 522, 526]. In particular, Section 526(a) includes five prerequisites for the sale or disposal of an unseaworthy vessel as follows:

(1) The property has to be appraised by disinterested persons to have an estimated value of less

than two thousand dollars ($2,000);

(2) There has to be no discernable registration, license, hull identification number, or other identifying insignia on the property, or the Department of Motor Vehicles is unable to produce any record of the registered or legal owners or lien holders;

(3) Not less than 72 hours before the property was removed, Respondent had to securely attach to "the Castle" a distinctive notice stating that the property would be removed by the public agency;

(4) Within 48 hours after the removal, excluding weekends and holidays, the public agency that removed or caused the removal of the property sent notice of the removal to the registered and legal owners, if known or discovered subsequent to the removal, at their addresses of record with the Department of Motor Vehicles, and to any other person known to have an interest in the property; and

(5) If the public agency is unable to locate the registered and legal owners of the property or person known to have an interest in the property as provided in paragraph (4), the public agency published, or caused to be published, the notice of removal for at least two weeks in succession in one or more daily newspapers circulated in San Diego County. [Pet. App. G, CA Harbors & Nav. C. § 526(a)].

Respondent failed to comply with at least four of the five procedural requirements necessary prior to disposition. This action by Respondent was a violation

of Petitioners' due process rights which has gone unchecked by both the district court and the Ninth Circuit.

3. The Lower Courts Incorrectly Relied On Section 8.25 In Finding That The PORT Had Authority To Support Its Actions.

Ultimately, the lower courts both based their finding of Respondent's authority to remove and destroy "the Castle" based upon the provisions of UPD section 8.25, which provided for removal and impoundment of vessels or watercraft found in violation of the Code in accordance with procedures enumerated in that section. However, the seizure notice issued by Respondent to provide notice to vessel owners only referenced an entirely different section, section 4.35, which at that time made no provision for the seizure of vessels under section 8.25. [Pet. App. G, UPD § 8.25].

Although both lower courts found that the Respondent's seizure of the Castle was authorized by UPD section 8.25, it was not until section 4.35 was amended *in 2004* – two years after the Castle was seized and destroyed – that enforcement was allowed through Section 8.25. Since the seizure at issue in this case took place in 2002, only section 4.35 was applicable and the lower courts erred in finding otherwise. [Pet. App. G, UPD § 8.25].

In particular, the actual seizure notice issued in this case, and as a matter of procedure sent to boat owners, only referenced section 4.35(c)(6). In 2002,

section 4.35(c)(6) placed a prohibition on the anchoring of vessels within San Diego Bay, except as otherwise permitted within particular anchorage areas. Moreover, Section 4.35(d), entitled -Injunctive Relief', set forth the sole applicable remedy for violation of section 4.35: "The San Diego Unified Port District may seek relief from the appropriate court to restrain or enjoin any violation of this Section." [Pet. App. G, UPD § 4.35(d)].

Although the entire section was later modified, eliminating the Injunctive Relief remedy and replacing it with a reference to section 8.25(a), that modification took place in 2004 — *after* the seizure and destruction of the Castle, but *during* litigation of the underlying matter.

Moreover, there was no notification or basis for Section 8.25's application in 2002 when the Castle was seized and destroyed. Therefore, since neither the seizure notice, nor UPD section 4.35(c), the section under which the vessel was seized, referred at all to section 8.25, the lower courts were incorrect in analyzing Respondent's actions under that code section.

To find otherwise would allow Respondent to issue a notice of a violation under one section apprising the offender of his or her remedies, then to proceed covertly under another section providing for entirely different remedies. This result undermines the entire purpose of providing notice and prevents an adequate and informed response in violation of the due process clause.

4.. Sections of the Code Are, At Best, Conflicting.

The only support that the district court provides in its order for the application of section 8.25 is a conclusory note that section 8.25 was amended on September 4, 2001 to apply to UPD section 4.35 violations. [Pet. App. D]. However, the amendment to which the court refers still does not evince an intent to specifically join section 4.35 with section 8.25 and extend the available remedies.

Likewise, the Ninth Circuit merely states that Respondent was not required to seek an injunction in order to enforce a violation of UPD section 4.35 because UPD section 8.25 "was in existence at the time of the seizure of the case, and section 8.25 did not require the Port to seek an injunction." [Pet. App. A].

If these interpretations are accurate, however, the Code sections are, at best, conflicting. That is because, as described, the former section 4.35 provided only for injunctive relief, while section 8.25 allows for entirely different enforcement. It was not until the 2004 amendment, in which the section 4.35 injunctive relief remedy was eliminated and replaced with a recourse identical to that in section 8.25, that the two sections could be read as the court suggests without a conflict.

The former discrepancy existing prior to amendment indicates a lack of intent by Respondent's Board that UDP section 8.25 trump another, equivalent code section, 4.35. As a result, the lower courts both erred in interpreting section 8.25 and section 4.35 as

connected prior to the 2004 amendment.

II. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT RELIED ON AN ERRONEOUS FACTUAL DETERMINATION

In its Mandate, the Ninth Circuit expressly found that ". . .Pierce and Morgan have not presented sufficient evidence to create a genuine issue of material fact of whether the former Port Director Don Nay had the authority to allow and authorized the Castle to rest in the location from which it was seized." [Pet. App. A}. This, however, is not correct.

Specifically, UPD Section 8.25(a)(2) gives the port executive director the power to enter into contracts with private citizens regarding anchoring within port tidelands. Specifically, Section 8.25(a)(2) reads as follows:

> "The Executive Director is authorized to enter into contracts, on behalf of the District, with private parties for the removal and impounding of any vessel, watercraft or object found in violation of any Federal or State law or provision of this Code." [Pet. App. G, UPD § 8.25(a)(2)].
>
> Thus, Petitioners had no obligation to produce evidence to create a genuine issue of material fact as to whether the former Port Director Don Nay had the authority to allow and authorized the Castle to rest in the location from

which it was seized because he had this authority as a matter of law.

Thus, this ground upon which the Ninth Circuit based its determination that Petitioners' due process claim fails as a matter of law is erroneous and should be reversed.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

TEEPLE HALL, LLP

By: _____

Lawrence W. Stirling,
Counsel of Record,
9255 Towne Centre Drive
Suite 500
San Diego, California 92121
(858) 622-7878

Attorneys for Petitioners

APPENDIX A -OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND DECIDED APRIL 22, 20091A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KATHLEEN PIERCE; MATTHEW MORGAN Plaintiffs-counter-defendants - Appellants, v. SAN DIEGO UNIFIED PORT DISTRICT,. Defendant - counter-claimant - Appellee.	No. 07-55537 D.C. No. CV-03-00172-IEG Southern District of California, San Diego **MANDATE**

The judgment of this Court, entered 04/22/2009, takes effect this date.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the federal rules of Appellate Procedure.

FOR THE COURT:

Molly C. Dwyer
Clerk of Court

/s/
By: Theresa Benitez
Deputy Clerk

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KATHLEEN PIERCE; MATTHEW MORGAN

Plaintiffs-counter-defendants - Appellants,

v.

SAN DIEGO UNIFIED PORT DISTRICT,.

Defendant - counter-claimant - Appellee.

No. 07-55537

D.C. No. CV-03-00172-IEG

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Irma E. Gonzalez, District Judge, Presiding

Argued and Submitted October 22, 2008
Pasadena, California

Before: PREGERSON and HALL, Circuit Judges, and EZRA, District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

Because the parties are well aware of the facts of this case, those facts will not be repeated here. Kathleen Pierce ("Pierce") and Matthew Morgan ("Morgan") appeal from the district court's grant of summary judgment in favor of the San Diego Unified Port District (the "Port") on their due process claim and their negligence claim, which stemmed from the seizure and destruction of a vessel known as the Castle. Pierce and Morgan also appeal from the grant of summary judgment in favor of the Port on the Port's counterclaim. We affirm.

This Court reviews a district court's grant of summary judgment de novo. *Golden Gate Restaurant Ass'n v. City and County of San Francisco*, 512 F.3d 1112, 1116 (9th Cir. 2008) (citing *Aguilera v. Baca*, 510 F. 3d 1161, 1165-67 (9th Cir. 2007)).

Pierce and Morgan's due process claim fails as a matter of law. Pierce and Morgan have not presented sufficient evidence to create a genuine issue of material fact of whether the former Port

Director Don Nay had the authority to allow and authorized the Castle to rest in the location from which it was seized.

In addition, the Port was not required to seek an injunction in order to enforce a violation of Unified Port District Code ("UPD") section 4.35 because UPD section 8.25 was in existence at the time of the seizure of the Castle, and section 8.25 did not require the Port to seek an injunction. Although a report issued by the Port implied that an injunction was the only means of enforcement for Section 4.35, the report does not supercede or replace the ordinances that were in effect and applicable at the time of the seizure.

UPD Code 8.25(a)(5) states that California's harbor and Navigation Code 500 et seq. Applies to vessels that are registered with the department of Motor Vehicles ("DMV"). The Castle was registered with the DMV. However, section 522 of the Harbor and Navigation Code does not apply to the factual circumstances in this case because it pertains only to vessels that have been abandoned and were without a watchman. *See* cal. Harb. & Nav. Code Section 526. The castle, however, was not impounded for being abandoned, and it had a watchman, James Morgan, who was present during the seizure. Section 504 of the Harbor and Navigation Code, known as the Boaters Lien Law and referred to in section 522 and 526, does not apply because Pierce and Morgan have not established that this case falls within the ambit of sections 522 or 526 in the first instance.

Pursuant to UPD section 8.25(a)(4), the Port had the authority to seize and destroy the Castle because it had attempted to locate the registered owner but was unable to do so due to her own negligence in failing to update her address, Pierce and Morgan's designated watchman, James Morgan, was aware of the seizure and was informed via letter that the owner could claim the Castle. Although James Morgan denies receiving this letter, the Port stored the Castle well beyond the thirty days required, and neither Pierce and Morgan nor their watchman made any attempts to obtain the Castle or otherwise contest its impoundment during the approximately six months that it was held.

Pierce and Morgan's negligence claim fails because, as noted by the district court, they cite no statute that imposed a mandatory duty on the Port. Finally, because the impoundment was lawful, the district court did not err in granting the Port's counterclaim and awarding impound related costs.

AFFIRMED

APPENDIX B - ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN CASE NUMBER 03CV171 DATED AND FILED FEBRUARY 2, 2005

UNITED STATES DISTRICT COURT

SOUTHER DISTRICT OF CALIFORNIA

MATTHEW MORGAN and JAMES MORGAN, Plaintiffs, vs. SAN DIEGO UNIFIED PORT DISTRICT, and Does 1 through 100, Inclusive. Defendants.	CASE NO. 03CV171 IEG (AJB), *consolidated with* 03CV171 AND 04cv1695 **ORDER GRANTING IN PART AND DENYING IN PART THE SAN DIEGO UNIFIED PROT DISTRICT'S MOTION FOR SUMMARY JUDGMENT**

Presently before the Court is defendant San Diego Unified Port District's (the "Port District") motion for summary judgment in the above-

captioned case. For the reasons stated below, the Court grants the Port District's motion as to the third and seventh causes of action, and denies the Port District's motion as to the first, fourth, fifth, sixth, eighth, and ninth causes of action.

BACKGROUND

A. Factual Background

This case arises from a dispute regarding a recreational boat rental business on the south San Diego Bay. James and Matthew Morgan ("plaintiffs") operated the rental business, which consisted of renting "small recreational vessels" and a "large floating recreational vessel[]" called "the Castle." (Third Amended Complaint ("TAC") ¶ 10.) According to plaintiffs, their business catered to Hispanic and African-American consumers who frequented the south San Diego Bay.

Starting in 1962, the Port District allegedly engaged in a conspiracy to deny ethnic Hispanics and African-Americans recreational use of the south San Diego Bay. (TAC ¶ 11.) As a part of this conspiracy, plaintiffs contend that the Port District took various actions, including cancelling plaintiffs' docking lease, in order to frustrate their ability to operate the rental business.(Id.) Finally, plaintiffs allege that the conspiracy culminated in 2002 when the Port District seized and destroyed plaintiffs' recreational vessels. (Id. ¶ 12).

B. Procedural Background

As a result of the alleged seizure and destruction of the vessels in January 2002, plaintiffs filed a claim with the Port District for recovery of damages on June 28, 2002. (TAC ¶ 8.) The Port District allegedly denied plaintiffs' claims on September 19,2002. (Id.) Thereafter, on January 27,2003, plaintiffs filed a complaint in this Court against the Port District and various other individuals.

On August 22, 2003, the Court granted a motion to dismiss as to certain defendants, and plaintiffs subsequently filed a first amended complaint on September 5, 2003. On October 3, 2003, the Court granted a motion to dismiss the first amended complaint as to certain defendants, but granted plaintiffs leave to file a second amended complaint. Thereafter, plaintiffs filed their second amended complaint on November 7, 2003.

On December 1,2003, the Port District filed a motion to dismiss portions of the second amended complaint. Specifically, the Port District sought the dismissal of the second cause of action for civil rights violations under 42 U.S.C. § 1985, and the ninth cause of action for general negligence against a public entity. On February 13, 2004, the Court granted the Port District's motion to dismiss both the second and ninth causes of action, but again permitted plaintiffs leave to amend. On February 24,2004, plaintiffs filed a third amended complaint, which acts as the operative complaint for the instant motion. On October 4, 2004, the Port

District filed a motion for summary judgment. Thereafter, on December 13, 2004, plaintiffs filed opposition to the Port District's motion. On December 30,2004 the Port District filed its reply. After the reply was filed, plaintiffs filed a supplemental declaration in support of their opposition to the summary judgment motion.

DISCUSSION

A. Legal Standard for Summary Judgment

"Under Rule 56(c), summary judgment is proper when the pleadings and discovery, read in the light most favorable to the nonmoving party, demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Armstrong v. Burlington Northern R. Co., 139 F.3d 1277. 1278 (9th Cir. 1998) (quoting 20th Century Ins. Co. v. Liberty Mut. Ins. Co., 965 F.2d 747,750 (9th Cir. 1992)); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is "genuine" when "the evidence presented is such that a jury applying [the appropriate] evidentiary standard could reasonably find for either the plaintiff or the defendant." Anderson, 477 U.S. at 255.

Once the moving party meets the requirement of Rule 56, the burden shifts to the party resisting the motion, who "must set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 256. It is not enough for the party opposing a properly supported

motion for summary judgment to "rest on mere allegations or denials of his pleadings." Id. Genuine factual issues must exist that "can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Id. at 250. To make such a showing, the nonmoving party must go beyond the pleadings to designate specific facts showing that there is a genuine issue for trial. Celotex Corp. V. Catrett, 477 U.S. 317, 325 (1986). The requirement that a nonmoving party go beyond the pleadings is meant to further one of Rule 56's principal purposes, namely "to isolate and dispose of factually unsupported claims or defenses." Id. at 323-24.

B. Preliminary Matters

1. Standing

As a preliminary matter, the Port District alleges that plaintiffs do not have standing to bring the instant complaint because they are not the legal or registered owners of the vessels allegedly seized and destroyed by the district. As support for this claim, the Port District points to certified copies of the California Department of Motor Vehicle registration sheets. The registration sheets list Kathleen Pierce as the legal owner of the vessels, but do not list either James or Matthew Morgan as holding any ownership interest in the vessels. (Memo. ISO Summary Judgment at Ex, A).

The Supreme Court has stated that the "irreducible constitutional minimum" of the

standing requirement consists of three elements. First, the plaintiff must have suffered an "injury in fact." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). The Supreme Court's opinions have defined such an injury as "an invasion of a legally protected interest which is (a) concrete and particularized; and, (b) actual or imminent, not conjectural or hypothetical." Id. (internal quotations omitted). Second, the injury must be fairly traceable to the challenged action of the defendants. See id. Third, it must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Id. at 561 (internal quotations omitted),

The requirement that the injury is particularized means that "[t]he plaintiff must have a personal stake in the outcome." Id., at 583. To be concrete, the injury must be more than "abstract." Id. Rather, plaintiff must demonstrate that he/she has "sustained or is immediately in danger of sustaining some direct injury as the result of the challenged statute or official conduct." Id., (internal quotation omitted).

In this case, the Port District argues that plaintiffs have not shown a particularized injury because they are not the legal or registered owners of the vessels at issue in this case. Plaintiffs concede that James Morgan has no ownership interest in any of the vessels at issue in this case, As a result, plaintiffs agree that James Morgan should be dismissed from the lawsuit for lack of standing. Plaintiff Matthew Morgan, however,

argues that he does possess an ownership interest in the vessels. Specifically, plaintiffs allege that on December 31,1990, Cecil Johnson (doing business as Party Boats/Party King) conveyed his interest in the "vessels, vehicles, equipment, and business know (sic) as Party King," to James Morgan.[1] Subsequently, on January I, 1991, James Morgan transferred his ownership interest in all Party King and Party Boat vessels to Matthew Morgan. Pursuant to this transfer, Matthew Morgan argues that he retains an ownership interest in the vessels.

In support of his ownership claim, Matthew Morgan has submitted what appears to be a record of conveyance of interests. The first document is a typed statement transferring ownership from Party King to James Morgan. The second document is a hand-written note transferring ownership from James Morgan to his grandson, Matthew Morgan. Based on these documents, it appears that Matthew Morgan has established a proprietary interest in the vessels.

By establishing an ownership interest in the vessels, Matthew Morgan has demonstrated a particularized injury, in that the Port District allegedly seized and destroyed his property. Additionally, there is a clear causal connection between the Port District's conduct and Morgan's alleged injury, because the Port District allegedly

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[1] According to the DMV registration lists, Cecil Johnson and/or Party Boats is listed as the registered owner of all te vessels at issue in this case. (See Memo ISO Summary Judgment at Ex. A)

destroyed Morgan's property without authorization. Finally, a favorable decision would provide redress to Matthew Morgan's alleged injury because a court or jury could award monetary damages to assuage Morgan's property loss. Plaintiff Matthew Morgan has therefore satisfied the three constitutional requirements needed to show standing.[2]

C. Analysis

1. Plaintiffs First Cause of Action: The Port District's Seizure and Destruction of the Vessels "Under Color of Law" Deprived Plaintiff of his Constitutional Rights.

Plaintiffs first cause of action alleges deprivations of his constitutional rights in violation of 42 U.S.C. § 1983. Section 1983 creates a cause of action against any person who, acting under color of state law, abridges rights created by the Constitution and laws of the United States. 42 U.S.C. § 1983. In the third amended complaint, plaintiff Matthew Morgan merely alleges that the Port District's "seizure and destruction of the 'vessels' under color or (sic) law deprived plaintiffs of rights secured by the Constitution and laws in violation of 42 U.S.C. 1983." (TAC ¶ 15.) Plaintiff does not specify precisely which constitutional

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[2] Because plaintiffs admit that James Morgan should be dismissed from the case for lack of standing, all references to "plaintiff' hereafter refer only to Matthew Morgan. at 4:19-25.) As a result, it appears that plaintiff is raising both an equal protection claim *and* a due process claim under section 1983.

rights have allegedly been violated by the Port District's actions. However, in plaintiffs opposition to the Port District's motion for summary judgment, he states that the first cause of action "involve[s] both due process and civil rights." (PI's Opp. at 7:13-14.) Additionally, in James Morgan's Supplemental Declaration, he states that the Port District had a policy of harassing his Hispanic and African-American customers, but not his customers who happened to be Caucasian. (Suppl. Decl. of James Morgan at 4:19-25.) As a result, it appears that plaintiff is raising both an equal protection claim and a due process claim under section 1983.

a) Equal Protection Claim

With regard to the equal protection claim, plaintiff alleges that the Port District's disparate treatment of minority and Caucasian customers violated the Equal Protection Clause of the Fourteenth Amendment. To state a claim under section 1983 for a violation of the Equal Protection Clause, a plaintiff must show that the defendant acted with a intent or purpose to discriminate against the plaintiff based on the plaintiffs membership in a protected class. Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998) (affirming a district court's dismissal of plaintiffs equal protection claim pursuant to section 1983 because plaintiff failed to demonstrate that he was a member of a protected class). As a result, plaintiffs equal protection claim is subject to dismissal.

Plaintiff alleges that the Port District "developed formal and informal policies to prevent usage of the Castle if the guests were Hispanic and African-American, but not to enforce such policies if the guests were white." (Morgan Suppl. Decl. at 4.) As a result, it appears that plaintiff is raising an equal protection claim on behalf of the minority customers (who *are* members of a protected class). Generally, a plaintiff lacks standing to bring an equal protection claim pursuant to section 1983 for a third party. However, the Supreme Court has held that a plaintiff may establish third party standing in rare cases.

Plaintiff argues that the instant case qualifies as such a "rare" case because he seeks to redress injuries to others in the context of a civil rights suit. Specifically, plaintiff cites the Supreme Court's decision in Sullivan v. Little Hunting Park, Inc., for the principle that he may bring a civil rights suit on behalf of a third party minority individual, even when it is only the third party who has suffered a deprivation. 396 U.S. 229, 237 (1969). However, the language in Sullivan demonstrates the narrowness of the exception to the ban on third-party standing. Specifically, Sullivan found that a court may infer a private right of action where the plaintiff is 'the only effective adversary' for the injured third party. Id.

Later Supreme Court cases have not extended the holding of Sullivan, but rather have only permitted plaintiffs to sue on behalf of third parties in the rare case that: (1) the third party is

unlikely to be able to sue; or (2) when there is a close relationship between the plaintiff and the third party. In the instant case, plaintiff has not shown that either condition is satisfied. Although the Sullivan court found that the Caucasian land owner might be the "only effective adversary" in 1969, the fact that minority plaintiffs regularly file section 1983 cases on their own behalf demonstrates that the Court's concern in Sullivan is not necessarily applicable to the case at hand.[3] Plaintiff has submitted no evidence showing that any of the minority customers would be unlikely to file their own section 1983 suit if the alleged actions by the Port District rose to the level of a constitutional deprivation. Additionally, plaintiff has not demonstrated a close relationship with the third party customers. The Ninth Circuit has explicitly held that a business lacks standing to assert section 1983 claims brought on behalf of former patrons who are racial minorities. See RK Ventures, Inc. v. City of Seattle, 307 F.3d 1045, 1054-55 (9th Cir. 2002). The Ninth Circuit reasoned that even if the plaintiff business prevailed on a section 1983 claim, the suit would not redress the former patrons' injuries, since any monetary damages would be awarded to the plaintiff business, not the minority customers. Id. at 1055. Similarly, in this case, because plaintiff has sued for money damages, even if his lawsuit were

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[3]Additionally, Sullivan involved a court's ability to create or infer a private cause of action in the context of civil rights cases, even when the statute did not explicitly create a cause of action.

ultimately successful, the customers' alleged injury of discriminatory treatment would not be redressed by the outcome of the suit.

Because plaintiff is not a member of a protected class, his equal protection claim is subject to dismissal as a matter of law. Additionally, although plaintiff appears to raise an equal protection claim on behalf of his minority customers, he has not satisfied the requirements for third party standing. As a result, the Court grants the Port District's motion for summary judgment as to plaintiffs equal protection claim.

b) Due Process Claim:

Plaintiff also alleges that the Port District, acting pursuant to an official policy that allowed the seizure and destruction of his vessels, violated section 1983 because it deprived plaintiff of his property without due process of law. (Pl's Opp. at 6.) The Port District argues that plaintiffs 1983 claim should be dismissed because he has not demonstrated that the Port District maintained a policy of tolerating police misconduct that caused the alleged constitutional violations. The Port District appears to be arguing that the alleged constitutional violation occurred when Harbor Police officers seized and destroyed plaintiffs vessels without proper authorization. This presumes that the police officers acted illegally when they seized and destroyed the vessels, rather than following the established policy of the Port District. The Port District argues that when a

municipal policy affords an employee discretion, the municipality cannot be held liable for that employee's actions if he exercised his discretion in an unconstitutional manner. Rather, the individual officer/employee is solely responsible if his discretionary actions caused the constitutional violation. (Mem. ISO Summary Judgment at 10).

It appears that the Port District has mischaracterized plaintiffs due process claim. The third amended complaint does not even reference the Harbor Police, let alone allege that the police effected a constitutional violation by abusing the discretion afforded to them by the Port District. (See PI's Opp. at 7.) Rather, plaintiff alleges that the Port District's official policy deprived him of his constitutional right to due process by authorizing the illegal seizure and destruction of his
vessels. From the pleadings, it appears that the Harbor Police were simply acting pursuant to this policy. Thus, plaintiff challenges the policy itself, not the independent or discretionary acts of the Harbor Police.

In order for the Port District to be held liable for a violation of 42 U.S.C. § 1983, plaintiff must show that the due process violation resulted from an official policy or custom. Monell v. Dep't of Social Servs., 436 U.S. 658, 661 (1978). There are five ways a plaintiff may establish the existence of a policy or custom sufficient to impose section 1983 liability on a municipality: (1) actions of municipal legislative bodies; (2) agencies exercising delegated authority; (3) individuals with final decision-

making authority; (4) a policy of inadequate training or supervision; and (5) custom. Id.; see also, Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986); City of Canton, Ohio v. Harris, 489 U.S. 378 (1989). In this case, it appears that plaintiff attempts to show that the due process violation occurred due to the act of an individual/entity with final decision-making authority. Because an agent of the Port District made the decision to remove and destroy plaintiffs vessels according to certain Port District ordinances, plaintiff alleges that the seizure and destruction was carried out through the official policy of the Port District. (TAC ¶ 12.) Additionally, because plaintiff alleges that he did not have proper notice to appeal or contest the Port District's decision to remove the vessels, he argues that the decision to seize and destroy the vessels was a "final" decision that was not subject to review. (Id. at ¶ 13.)

The Supreme Court has held that "municipal liability under section 1983 attaches where-and only where- a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." Pembaur, 475 U.S. at 483-84. In other words, municipal liability cannot be imposed merely because an employee has discretion in the discharge of his or her duties. Rather, the action must be the "final government policy" in order for municipal liability to attach. Id. Such authority can be granted legislatively or be delegated from higher officials. Id. In this case, the Port Master Plan

delegates to the Port District, and to the District Director, the authority to regulate the use of the A-8 anchorage of the south San Diego Bay. SDUPD Port Master Plan at 44. Additionally, both the Port District Code and the Harbors and Navigation Code assign the Port District (and the District Director) the task of determining whether a vessel is "abandoned," and arranging for its subsequent removal and/or destruction. See San Diego Port District Code § 8.25; Cal. Harb. & Nav. Code § 522. Thus, it appears that the actions taken by the Port District in this case were the independent and authoritative acts of a final decision-maker. As a result, plaintiff has successfully demonstrated that there is at least a genuine issue of fact as to whether the Port District's seizure and destruction of the vessels were carried out pursuant to an official policy. The Port District's motion for summary judgment as to plaintiffs due process claim under section 1983 should therefore be denied.

c) Adequacy of State Remedies

The Port District also argues that plaintiffs section 1983 claim should be dismissed because there are adequate state remedies to protect his due process rights. As support for this argument, the Port District cites two Supreme Court cases which appear to limit due process claims brought under section 1983 when the state provides an adequate post-deprivation remedy. (Mem. ISO Summary Judgment at 11 (citing Hudson v. Palmer, 468 U.S. 517 (1984) and Parratt v.Taylor, 451 U.s. 527

(1981). However, in both Parratt and Hudson, the Court emphasized that the due process deprivations were the result of random and unauthorized acts, not official policy. See Parratt, 451 U.S. at 541; Hudson, 468 U.S. at 533. Furthermore, in Zinermon v. Burch, 494 U.S. 113, 138-39 (1990), the Court explicitly stated that a section 1983 suit is available for the deprivation of due process if the harms resulted from an official government policy.

In this case, plaintiff has alleged that his due process rights were violated as a result of the Port District's policy allowing for the seizure and destruction of plaintiffs vessels. (See TAC ¶ 15.) Contrary to the Port District's characterization of plaintiffs claims, the third amended complaint does not allege that the due process violations resulted from the random, unauthorized acts of the Harbor Police. Rather, it appears that plaintiff alleges that the agents directly responsible for the seizure and destruction of the vessels were acting pursuant to the established policy of the Port District. As a result, plaintiff is not barred from bringing a section 1983 claim for the alleged violation of his due process rights. See Parratt, 451 U.S. at 541.

d) Rooker-Feldman Doctrine

The Port District also argues that plaintiffs section 1983 claim should be dismissed pursuant to the Rocker-Feldman doctrine. The Rocker-Feldman doctrine is based on two Supreme Court cases which held that federal courts do not have jurisdiction pursuant to section 1983 to review

judgments and decisions of state courts. In Rocker v. Fidelity Trust Co., when the plaintiffs attempted to have a state court judgment declared "null and void," the Supreme Court ruled that federal district courts have no jurisdiction to "entertain a proceeding to reverse or modify" a state court judgment. 263 U.S. 413 (1923). In District of Columbia Court of Appeals v. Feldman, the Supreme Court again ruled that a district court has "no authority to review final judgments of a state court in judicial proceedings." 460 U.S. 462 (1983).

The Supreme Court has subsequently explained that, according to the Rooker-Feldman doctrine, "a party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States Court based on the losing party's claim that the state judgment itself violates the loser's federal rights." Johnson v. DeGrandy, 512 U.S. 997, 1005-06 (1994).

In this case, the Port District argues that all of plaintiffs causes of action, including the section 1983 claim, "arise" directly out of and are inextricably intertwined with the state court judgment which authorized the Port District to seize and destroy the Castle if plaintiff did not remove them from District lands. (See Judgment for Ejectment, Removal and Damages, Cal. Sup. Ct. Case No. 636966 (Mem. ISO Summary Judgment, Ex. G)). The judgment states, in pertinent part:

> Defendants shall remove Neptune's Palace and the Castle (also known as Excalibur), from plaintiffs lands, and restore the land to plaintiff without the encroachment of Neptune's Palace and the Castle within thirty (30) days or on or before May 2, 1992...
>
> If defendants do not remove Neptune's Palace and the Castle by May 2, 1992, plaintiff may remove Neptune's Palace and the Castle from plaintiffs lands and recover the costs of removal and/or destruction.[4]

Plaintiff states that he moved the Castle in compliance with the state court's order after exhausting all possibilities for appellate review. (Morgan Decl. at 4; Pl.'s Opp. at 8.) Thus, plaintiff argues that he complied with the state court's order and is not challenging its validity in the instant federal case. Plaintiff contends that the state court order only allowed the Port District limited authority to seize and/or destroy the Castle if it was not moved by May 2, 1992. According to plaintiff, once he complied with the state court's final order, the Port District no longer had any authority to seize or destroy the Castle.

While it is clear that there is an ongoing dispute between plaintiff and the Port District as to

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[4] In the state court proceedings, the Port District was the plaintiff and Kathleen Pierce and James Morgan were named defendants. Matthew Morgan was not a named defendant.

where the Castle should be anchored, the actual holding of the state court only authorized the Port District to remove and/or destroy the vessels if plaintiff did not remove the vessels from a certain location by the court-ordered deadline. James Morgan has submitted a sworn declaration stating that he and plaintiff Matthew Morgan moved the vessels pursuant to the state court's order. As a result, while the current suit appears to arise from an ongoing dispute between James and Matthew Morgan and the Port District, it does not appear to be a challenge to the state court order. Thus, the Port District's claim that plaintiffs suit is barred by the Rocker-Feldman doctrine is unpersuasive.

2. Plaintiffs Third Cause of Action: Ordinance 2107 is Invalid

According to plaintiff, the Port District seized and destroyed the vessels pursuant to Ordinance 2107, codified in the San Diego Port District Code at section 4.36. (TAC ¶ 19.) Section 4.36 sets forth regulations for the anchoring, mooring, towing, and docking of vessels in the A-8 anchorage of the south San Diego Bay. SDUPD Code § 4.36. Most significantly, section 4.36 contains three restrictions on the use of the A-8 anchorage: (I) it prohibits business or commercial enterprises in the A-8 anchorage; (2) it prohibits barges and floating docks in the A-8 anchorage; and (3) it prohibits vessels exceeding sixty-five feet in length from anchoring or mooring in the A-8 anchorage without a special permit. Id. at § 4.36 (k).

The language of section 4.36 clearly gives the Port District power to regulate the use of the A-8 anchorage. However, plaintiff argues that section 4.36 is invalid because it amends the Port Master Plan, yet never received the requisite approval by the California Coastal Commission. (TAC ¶ 20.) In contrast, the Port District argues that section 4.36 is not an amendment to the Port Master Plan, but rather an example of the very type of regulation that the Port District is authorized to implement pursuant to the Port Master Plan.

The Port Master Plan created "anchorage areas" in the San Diego Bay to prohibit long-term (i.e. permanent or semi-permanent) anchoring in the Bay that might interfere with short-term uses of the Bay for fishing, sailing, and other recreational activity. (See SDUPD Port Master Plan at 44, (Mem. ISO Summary Judgment, Ex. K).) The Port Master Plan explicitly states that the use or development of the A-8 anchorage "shall be at the discretion of the Port District." (Id.) Thus, the regulations set forth by section 4.36 appear to be not only permitted, but actually contemplated by the Port Master Plan.

Plaintiff argues that section 4.36 restricts use of the A-8 anchorage in a way not authorized by the Port Master Plan, since the Port Master Plan does not contain the three restrictions added in section 4.36(k). As a result, plaintiff argues that section 4.36 should be considered an amendment to the Port Master Plan, thereby requiring approval from the California Coastal Commission. However,

because the Port Master Plan states that the use or development of the A-8 anchorage "shall be at the discretion" of the Port District, the Port District is authorized to regulate the use of the A-8 anchorage. See SDUPD Port Master Plan at 44. A plain reading of the ordinance suggests that the Port District is entitled judgment as a matter of law as to the third cause of action. Moreover, plaintiff has submitted no evidence demonstrating that section 4.36 should be viewed as anything more than a regulation pursuant to the authority granted to the Port District through the Port Master Plan. Therefore, the Court grants the Port District's motion for summary judgment as to the third cause of action.

3. Plaintiffs Fourth Cause of Action: The Port District Lacked Authority to Destroy Plaintiffs Vessels

Plaintiffs fourth cause of action simply states, "San Diego Unified Port District Ordinance 2107 [codified at section 4.36] limits destruction of seized vessels to abandoned vessels. Plaintiff['s] vessels were not abandoned and thus their destruction by defendant San Diego Unified Port District was unlawful." In other words, plaintiff argues that, even assuming section 4.36 to be valid, the Port District deprived plaintiff of his due process rights by improperly seizing and destroying vessels that had not been "abandoned" under section 4.36.

Section 4.36(b)(2) defines "abandonment" as:

> Any hulk, derelict, wreck or parts of any ship, vessel, or other watercraft, sunk, beached or allowed to remain in an unseaworthy or dilapidated condition upon publicly owned submerged lands, salt marsh, or tidelands within the corporate limits of the District, without the consent of District. .. for a period of longer than thirty (30) days without a watchman or other person being maintained upon or near and in charge of the property.

In its motion for summary judgment, the Port District argues that the vessels were, in fact, "abandoned" pursuant to section 4.36(b)(2), and the Port District was therefore authorized to remove and/or destroy the vessels. (Mem. ISO Summary Judgment at 20.) Specifically, the Port District argues that the vessels were in an unseaworthy condition without the consent of the District. In support of its claim, the Port District has submitted a Vessel Report, dated January 29, 2002, which cites the Castle as being anchored in an unseaworthy condition for over two years. (Id. at Ex, Q.) Based on this claim, the Port District argues that it is entitled to summary judgment on the fourth cause of action. (Id. at 20.)

Although the Vessel Report indicates that the Castle may meet the definition of "abandonment" within section 4.36, all pleadings and discovery must be read in the light most

favorable to the non-moving party on a motion for summary judgment. See Fed. R. Civ. Pro.56(c). Since the Port District has submitted evidence tending to show that the Castle qualifies as an abandoned vessel under section 4.36, the burden shifts to plaintiff to demonstrate that there exists a genuine issue as to a material fact regarding abandonment. In this case, plaintiff has submitted evidence that the vessels were never abandoned because they were never left unattended for a period of thirty days or longer. Specifically, plaintiff has submitted the sworn declaration of James Morgan, who states, "I personally acted as watchman or personally observed others do so, more often than every 30 days." (Decl. of James Morgan at 5.)

Under section 4.36, it appears that a vessel must be without a watchman for at least a thirty day period in order to be considered "abandoned." From the language of the statute, this requirement appears to be independent from any finding that a vessel is unseaworthy. At the very least, there is a triable issue as to whether the Vessel Report is sufficient to deem the Castle "abandoned," especially given that the Castle allegedly had a watchman on board during the time at issue.

Because the declaration speaks to facts within the personal knowledge of James Morgan, it is sufficient evidence to create a genuine issue for trial. The Ninth Circuit has explicitly stated that it is not the role of the court to weight the viability of the evidence at the summary judgment stage of the

proceedings. See Clicks Billiards, Inc. v. Sixshooters, Inc., 251 F.3d 1252 (9th Cir. 2001) ("On summary judgment, the district court is prohibited from weighing evidence and deciding issues of contested fact, because it is not the role of the district court at such stage to decide which party has the more compelling argument; rather, it is simply to determine whether a triable issue of fact exists."). Construing all facts in the light most favorable to plaintiff, the Court finds that he has submitted sufficient evidence to raise a triable issue of fact as to whether the vessels were "abandoned" under section 4.36. Accordingly, the Court denies the Port District's motion for summary judgment as to the fourth cause of action.

4. Plaintiffs Fifth Cause of Action: Violation of Harbors and Navigation Code

In the fifth cause of action, plaintiff alleges that the Port District's seizure and destruction of his vessels violated the California Harbors and Navigation Code (sections 500 et seq.) because the Port District failed to provide notice as required by the code. (TAC ¶ 25.) According to plaintiff, because the Port District failed to follow the requirements of the Harbors and Navigation Code, the seizure of the vessels was unlawful. The Port District's sole argument in response to plaintiffs fifth cause of action is that California Harbors and Navigation Code does not apply because the Castle is not a "vessel" as defined by that statute. (Mem. ISO Summary Judgment at 18.)

California Harbors and Navigation Code section 21 states:

"Vessel" includes ships of all kinds, steamboats, steamships, canal boats, barges, sailing vessels, and every structure adapted to be navigated from place to place for the transportation of merchandise or persons.

Cal. Harb & Nav. Code § 21. Although this definition appears to be quite broad, the Port District argues that the Castle is not a "vessel," but rather a structure. As support for this claim, the Port District points to a letter from the U.S. Coast Guard, which deemed the Castle "to have been taken out of navigation and made substantially a land structure, for purposes of the Coast Guard requirements detailed in Title 46 of the Code of Federal Regulations." (Letter to James Morgan from E.A. Harmes, Commander U.S. Coast Guard, dated June 22, 1984 (Mem. ISO Summary Judgment, Ex. L).) What the Port District fails to point out, however, is that the letter went on to state that "this designation will be rescinded should the nature of your activities in South San Diego Bay change." (Id.) As a result, it appears that the designation of the Castle as a "structure" rather than a "vessel" was based on the activities of the Castle at that time, and was subject to change.

To rebut the conclusion reached in the letter by Commander Harmes, plaintiff has submitted a letter from D.P. Montoro, Commander, U.s. Coast Guard, dated November 16, 1990. (Supp. Decl. of

James Morgan, Ex. C). The letter references the earlier letter from Coast Guard Commander Harmes, but reaches the exact opposite conclusion as to the Castle's categorization. Specifically, the letter states, "It is my opinion that the Excalibur [Lc. Castle] and the Neptune Palace are in fact vessels..." *Od.)* The conflicting letters demonstrate that a genuine issue of material fact exists as to whether the Castle should be categorized as a "vessel" under California Harbors and Navigation Code section 21, or whether it should be labeled as a "structure." Because plaintiff has demonstrated a genuine factual dispute, the Court denies the Port District's motion for summary judgment as to plaintiffs fifth cause of action.

5. Plaintiffs Sixth Cause of Action: Failure to Comply with Ordinance 8.25

Plaintiffs sixth cause of action alleges that the Port District "failed to comply with the requirements of section 8.25 of the San Diego Unified Port District Code in that notices of seizure, demands for payment, and publication of sale were not given, and thus the destruction of the vessels was unlawful." (TAC ¶ 27.) In its motion for summary judgment, the only argument raised by the Port District with regard to plaintiffs sixth cause of action is that the Castle is not a "vessel" under Harbors and Navigation Code section 21. (Mem. ISO Summary Judgment at 18-19.) Because plaintiff has established that there is a genuine issue of material fact as to whether the Castle should be categorized as a "vessel" or a structure,

the Court denies the Port District's motion for summary judgment as to the sixth cause of action.

6. Plaintiffs Seventh Cause of Action: Section 8.25(a)(4) is Unconstitutional

Plaintiffs seventh cause of action alleges that section 8.25(a)(4) of the San Diego Unified Port District Code gives the Port District the "unfettered option to destroy [plaintiffs vessels] without notice or hearing." (TAC ¶ 29.) Plaintiff alleges that such unfettered discretion is a violation of the Due Process Clauses of both the Federal and California Constitutions. (Id.)

Section 8.25 grants the Port District the authority to remove water craft from the San Diego Bay. SDUPD Code § 8.25. Specifically, section 8.25(a)(4) states that California Harbors and Navigation Code section 522(a) governs removal of water craft where such water craft are abandoned. Id. Harbors and Navigation Code section 522(a) states in pertinent part:

> Any hulk, derelict, wreck, or parts of any ship vessel, or other watercraft sunk, beached, or allowed to remain in an unseaworthy or dilapidated condition upon publicly owned submerged lands, salt marsh, or tidelands within the corporate limits of any municipal corporation or other public corporation or entity having jurisdiction or control over those lands, without its consent expressed by resolution of its legislative

> body, for a period of longer than 30 days without a watchman or other person being maintained upon or near and in charge of the property, is abandoned property.
>
> Thereafter, that municipal corporation or other public corporation or entity may, notwithstanding any other provision of law, take title to the abandoned property for the purposes of abatement without satisfying any property tax lien on that property, and also may cause the property to be sold, destroyed, or otherwise disposed of in any manner it determines is expedient or convenient.

Plaintiff argues that because section 522(a) authorizes the Port District to sell, destroy, or otherwise dispose of "abandoned" property in any manner it determines to be "expedient or convenient," it authorizes the Port District to destroy plaintiffs property without notice or hearing. (PI. 's Opp. 10-11.) However, the Port District points out that Harbors and Navigation Code section 500 et seq. provides a statutory scheme of notices and hearings required prior to the removal and/or destruction of vessels. (Memo. ISO Summary Judgment at 23.) For example, sections 518 and 519 outline the notice requirements for the sale of wrecked vessels. Cal. Harb. & Nav. Code §§ 518-519. Additionally, section 522(b) provides that if the owner ofan "abandoned" vessel claims the vessel, the Port District may not destroy the property without first providing the owner fifteen

days notice to remove the property from Port lands. Id. at § 522(b). These notice requirements demonstrate that the discretion granted to the Port District in section 8.25 is not without limitation. Thus, plaintiffs claim that section 8.25 is unconstitutional because it fails to provide due process safeguards fails as a matter of law. As a result, the Court grants the Port District's motion for summary judgment as to the seventh cause of action.

7. Plaintiffs Eighth Cause of Action: Defective Notice Before the Port District Destroyed Vessels

Plaintiff's eighth cause of action alleges that the Port District failed to provide adequate notice prior to seizing and destroying plaintiffs vessels. (TAC ¶ 3I.) Specifically, plaintiff alleges that the notices were defective because they did not comply with the San Diego Unified Port Code, and they made reference to inapplicable code sections pertaining to plaintiffs potential remedies. (Id.) The Port District has not submitted any evidence to the Court demonstrating that it complied with the pertinent notice requirements prior to removing and destroying the vessels. In fact, in its moving papers, the Port District does not even address plaintiffs eighth cause of action with any specificity. As a result, the Court denies the Port District's motion for summary judgment as to plaintiffs eighth cause of action.

8. Plaintiffs Ninth Cause of Action: Negligence under California Government Code 815.2

Plaintiffs ninth cause of action alleges that the Port District was negligent in seizing and destroying the vessels. As a result, plaintiff alleges that the Port District is liable for monetary damages under California Government Code section 815.2. (TAC ¶ 33.)

In its motion for summary judgment, the Port District argues that plaintiffs ninth cause of action should be dismissed because both the Port District and its employees are immune from tort liability under California Government Code section 820.4. (Mem. ISO Summary Judgment at 27.) In support of its immunity argument, the Port District cites Sava v. Fuller, 249 Cal.App.2d 281 (Cal. Ct. App. 1967). Sava held that a public entity is immune from liability when the alleged tort resulted from the discretionary act of its employee. Id. at 284. However, the Sava court stated that the key inquiry in determining immunity involved the statutory meaning of the words, "exercise of discretion invested in [the employee]." Id.; see also, Cal. Govt. Code § 820.2. In analyzing this issue, Sava found that discretionary acts are those involving the exercise of judgment, including acts "incidental and collateral to the performance of the principal purpose ofa public employee's office." Sava, 249 Cal.App.2d at 287 (citing Glickman v. Glasner, 230 Cal.App.2d 120 (Cal. Dist.Ct. App. 1964».

A careful reading of Sava suggests that the Port District's reliance on its holding is misplaced. In Sava, the court held that when an employee acts pursuant to a mandatory grant of authority, neither the employee nor the public entity can be shielded by immunity. Id. at 291. Therefore, if a statute authorizes an employee to take a given action, the performance of such action is not discretionary, and therefore does not gamer immunity.

In this case, section 522 of the Harbors and Navigation Code, as well as section 8.25 of the Port District Code, authorize the Port District to remove and/or destroy abandoned vessels. See SDUPD Code § 8.25; Cal. Harb. & Nav. Code § 522. Additionally, sections 523 and 524 of the Harbors and Navigation Code provide additional authority for employees to remove vessels in other circumstances. Cal. Harb. & Nav. Code §§ 523-524. As a result, it appears that the seizure and destruction of plaintiffs vessels was done pursuant to a mandatory grant of authority. Such an act would be carried out at the direction of the Port District, pursuant to its official policy, rather than through the discretion of individual police officers. As a result, a genuine issue of material fact exists as to the question of whether the seizure and destruction of plaintiff s vessels was an act of discretion, or whether it was pursuant to mandatory Port District policy (i.e. not involving the exercise of discretion). See, e.g. Wallis v. Spencer, 202 F.3d 1126 (S.D. Cal. 2000) (reaching a similar conclusion as to summary judgment in a police discretion case); see also, Ogborn v. City of

Lancaster, 124 Cal.Rptr.2d 238 (Cal. Ct. App. 2002). The Court therefore denies the Port District's motion for summary judgment as to the ninth cause of action.

CONCLUSION

For the foregoing reasons, the Court **GRANTS** the Port District's motion for summary judgment only as to: (1) plaintiff's first cause of action for alleged violations of the Equal Protection Clause of the Fourteenth Amendment; (2) plaintiff's third cause of action; and (3) plaintiff's seventh cause of action. The Court **DENIES** the Port District's motion for summary judgment as to the remaining causes of action.

IT IS SO ORDERED.
Dated: February 2, 2005

/s/
HON. IRMA E. GONZALEZ, Chief Judge, United States District Court

cc: Magistrate Judge Anthony J. Battiglia
All parties

APPENDIX C - ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN CASE NUMBER 03CV172 DATED AND FILED FEBRUARY 2, 2005

UNITED STATES DISTRICT COURT

SOUTHER DISTRICT OF CALIFORNIA

KATHLEEN PIERCE, ,

Plaintiff,

v.

SAN DIEGO UNIFIED PORT DISTRICT, and Does 1 through 100, Inclusive.

Defendants.

CASE NO. 03CV172 IEG (AJB),

ORDER GRANTING IN PART AND DENYING IN PART THE SAN DIEGO UNIFIED PROT DISTRICT'S MOTION FOR SUMMARY JUDGMENT

Presently before the Court is defendant San Diego Unified Port District's (the "Port District") motion for summary judgment in the above-captioned case. For the reasons stated below, the Court grants the Port District's motion as to the third and seventh causes of action, and denies the Port District's motion as to the first, fourth, fifth, sixth, eighth, and ninth causes of
action.

BACKGROUND

A. Factual Background

This case arises from a dispute regarding a recreational boat rental business on the south San Diego Bay. Kathleen Pierce ("plaintiff') held a security interest in the rental vessels in the amount of$283,000 (Second Amended Complaint ("SAC") '19.) According to plaintiff, the business catered to Hispanic and African-American consumers who frequented the south San Diego Bay.

Starting in 1962, the Port District allegedly engaged in a conspiracy to deny ethnic Hispanics and African-Americans recreational use of the south San Diego Bay. (SAC ¶ II.) As a part of this conspiracy, plaintiff contends that the Port District took various actions, including cancelling plaintiffs docking lease, in order to frustrate her ability to operate the rental business. (Id.) Finally, plaintiff alleges that the conspiracy culminated in 2002 when the Port District seized and destroyed plaintiffs recreational vessels. (Id. ¶ 12).

B. Procedural Background

As a result of the alleged seizure and destruction of the vessels in January 2002, plaintiff filed a claim with the Port District for recovery of damages on June 28, 2002. (SAC ¶ 8.) The Port District allegedly denied plaintiffs claims on July 18, 2002. (Id.) Thereafter, on January 27,2003, plaintiff filed a complaint in this Court against the

Port District and various other individuals.

On September 5,2003, plaintiff filed a first amended complaint. On September 29,2003 the Court granted a motion to dismiss certain defendants, but granted plaintiff leave to amend. Thereafter, on November 7,2003, Pierce filed a second amended complaint. On December 1, 2003, the Port District filed a motion to dismiss portions of plaintiffs second amended complaint. Specifically, the Port District sought the dismissal of the second cause of action for civil rights violations under 42 U.S.C. § 1985, and the ninth cause of action for general negligence against a public entity. On February 13, 2004, the Court granted the Port District's motion to dismiss as to the second cause of action, but denied it as to the ninth cause of action. Although the Court granted plaintiff leave to amend, she has not filed a third amended complaint.

On September 30, 2004, the Port District filed a motion for summary judgment. Thereafter, on December 13,2004, plaintiff filed opposition to the Port District's motion. On December 30, 2004 the Port District filed its reply. After the reply was filed, plaintiff filed a supplemental declaration in support of her opposition to the summary judgment motion.

DISCUSSION

A. Legal Standard for Summary Judgment

"Under Rule 56(c), summary judgment is proper when the pleadings and discovery, read in the light most favorable to the nonmoving party, demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Armstrong v. Burlington Northern R. Co., 139 F.3d 1277. 1278 (9th Cir. 1998) (quoting 20th Century Ins. Co. v. Liberty Mut. Ins. Co., 965 F.2d 747, 750 (9th Cir. 1992»; see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is "genuine" when "the evidence presented is such that a jury applying [the appropriate] evidentiary standard could reasonably find for either the plaintiff or the defendant." Anderson, 477 U.S. at 255.

Once the moving party meets the requirement of Rule 56, the burden shifts to the party resisting the motion, who "must set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 256. It is not enough for the party opposing a properly supported motion for summary judgment to "rest on mere allegations or denials of his pleadings." Id. Genuine factual issues must exist that "can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Id. at 250. To make such a showing, the nonmoving party must go beyond the pleadings to designate specific facts showing that there is a genuine issue for trial. Celotex Com. v. Catrett, 477 U.S. 317, 325 (1986). The requirement that a nonmoving party go beyond the pleadings is meant to further one of Rule 56's principal purposes, namely "to isolate and dispose

of factually unsupported claims or defenses." Id. at 323-24.

B. Analysis

1. Plaintiffs First Cause of Action: The Port District's Seizure and Destruction of the Vessels "Under Color of Law" Deprived

Plaintiff of her Constitutional Rights Plaintiffs first cause of action alleges deprivations of her constitutional rights in violation of 42 U.S.C. § 1983. Section 1983 creates a cause of action against any person who, acting under color of state law, abridges rights created by the Constitution and laws of the United States. 42 U.S.C. § 1983. In the second amended complaint, plaintiff merely alleges that the Port District's "seizure and destruction of the 'vessels' under color or (sic) law deprived plaintiff of rights secured by the Constitution and laws in violation of 42 U.S.C. 1983." (SAC ¶ 15.) Plaintiff does not specify precisely which constitutional rights have allegedly been violated by the Port District's actions. However, in plaintiffs opposition to the Port District's motion for summary judgment, she states that the first cause of action "involve[s] both due process and civil rights." (PI's Opp. at 5:7-8.) Additionally, plaintiff has submitted a Supplemental Declaration by James Morgan, in which he states that the Port District had a policy of harassing Hispanic and African-American customers, but not Caucasian customers. (Suppl.

Decl. of James Morgan at 4: 19-25.) As a result, it appears that plaintiff is raising both an equal protection claim and a due process claim under section 1983.

a) Equal Protection Claim

With regard to the equal protection claim, plaintiff alleges that the Port District's disparate treatment of minority and Caucasian customers violated the Equal Protection Clause of the Fourteenth Amendment. To state a claim under section 1983 for a violation of the Equal Protection Clause, a plaintiff must show that the defendant acted with a intent or purpose to discriminate against the plaintiff based on the plaintiffs membership in a protected class. Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998) (affirming a district court's dismissal of plaintiffs equal protection claim pursuant to section 1983 because plaintiff failed to demonstrate that he was a member of a protected class). Because plaintiff has not alleged that she is a member of a protected class, her equal protection claim is subject to dismissal.

Plaintiff alleges that the Port District "developed formal and informal policies to prevent usage of the Castle if the guests were Hispanic and African-American, but not to enforce such policies if the guests were white." (Morgan Suppl. Decl. at 4.) As a result, it appears that plaintiff is raising an equal protection claim on behalf of the minority customers (who are members of a protected class).

Generally, a plaintiff lacks standing to bring an equal protection claim pursuant to section 1983 for a third party. However, the Supreme Court has held that a plaintiff may establish third party standing in the rare case that: (I) the third party is unlikely to be able to sue; or (2) when there is a close relationship between the plaintiff and the third party.

In the instant case, plaintiff has not shown that either condition is satisfied. Plaintiff has submitted no evidence showing that any of the minority customers would be unlikely to file their own section 1983 suit if the alleged actions by the Port District rose to the level of a constitutional deprivation. Additionally, plaintiff has not demonstrated a close relationship with the third party customers. The Ninth Circuit has explicitly held that a business lacks standing to assert section 1983 claims brought on behalf of former patrons who are racial minorities. See RK Ventures, Inc. v. City of Seattle, 307 F.3d 1045, 1054-55 (9th Cir. 2002). The Ninth Circuit reasoned that even if the plaintiff business prevailed on a section 1983 claim, the suit would not redress the former patrons' injuries, since any monetary damages would be awarded to the plaintiff business, not the minority customers. Id. at 1055. Similarly, in this case, because plaintiff has sued for money damages, even if her lawsuit were ultimately successful, the customers' alleged injury of discriminatory treatment would not be redressed by the outcome of the suit.

Because plaintiff is not a member of a protected class, her equal protection claim is subject to dismissal as a matter of law. Additionally, although plaintiff appears to raise an equal protection claim on behalf of her minority customers, she has not satisfied the requirements for third party standing. As a result, the Court grants the Port District's motion for summary judgment as to plaintiff's equal protection claim.

b) Due Process Claim

Plaintiff also alleges that the Port District, acting pursuant to an official policy that allowed the seizure and destruction of her vessels, violated section 1983because it deprived plaintiff of her property without due process of law. (PI's Opp. at 4-5.) The Port District argues that plaintiff's 1983 claim should be dismissed because she has not demonstrated that the Port District maintained a policy of tolerating police misconduct that caused the alleged constitutional violations. The Port District appears to be arguing that the alleged constitutional violation occurred when Harbor Police officers seized and destroyed plaintiff's vessels without proper authorization. This presumes that the police officers acted illegally when they seized and destroyed the vessels, rather than following the established policy of the Port District. The Port District argues that when a municipal policy affords an employee discretion, the municipality cannot be held liable for that employee's actions if he exercised his discretion in an unconstitutional manner. Rather, the individual

officer/employee is solely responsible if his discretionary actions caused the constitutional violation. (Mem. ISO Summary Judgment at 6-7).

It appears that the Port District has mis-characterized plaintiff's due process claim. The second amended complaint does not even reference the Harbor Police, let alone allege that the police effected a constitutional violation by abusing the discretion afforded to them by the Port District. (See PI's Opp. at 5.) Rather, plaintiff alleges that the Port District's official policy deprived her of her constitutional right to due process by authori ing the illegal seizure and destruction of her vessels. From the pleadings, it appears that the Harbor Police were simply acting pursuant to this policy. Thus, plaintiff challenges the policy itself, not the independent or discretionary acts of the Harbor Police.

In order for the Port District to be held liable for a violation of42 U.S.C. § 1983, plaintiff must show that the due process violation resulted from an official policy or custom. Monell v. Dep't of Social Servs., 436 U.S. 658, 661 (1978). There are five ways a plaintiff may establish the existence of a policy or custom sufficient to impose section 1983 liability on a municipality: (I) actions of municipal legislative bodies; (2) agencies exercising delegated authority; (3) individuals with final decision-making authority; (4) a policy of inadequate training or supervision; and (5) custom. rd.; see also Pembaur v. City of Cincinnati, 475U.S.469,480(1986); City of Canton,

Ohio v. Harris, 489 U.S. 378 (1989). In this case, it appears that plaintiff attempts to show that the due process violation occurred due to the act of an individual/entity with final decision-making authority. Because an agent of the Port District made the decision to remove and destroy plaintiffs vessels according to certain Port District ordinances, plaintiff alleges that the seizure and destruction was carried out through the official policy of the Port District. (SAC'112.) Additionally, because plaintiff alleges that she did not have proper notice to appeal or contest the Port District's decision to remove the vessels, he argues that the decision to seize and destroy the vessels was a "final" decision that was not subject to review. (Id. at ¶ 13.)

The Supreme Court has held that "municipal liability under section 1983 attaches where-and only where-a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." Pembaur, 475 U.S. at 483-84. In other words, municipal liability cannot be imposed merely because an employee has discretion in the discharge of his or her duties. Rather, the action must be the "final government policy" in order for municipal liability to attach. Id. Such authority can be granted legislatively or be delegated from higher officials. Id.

In this case, the Port Master Plan delegates to the Port District, and to the District Director, the

authority to regulate the use of the A-8 anchorage of the south San Diego Bay. SDUPD Port Master Plan at 44. Additionally, both the Port District Code and the Harbors and Navigation Code assign the Port District (and the District Director) the task of determining whether a vessel is "abandoned," and arranging for its subsequent removal and/or destruction. See San Diego Port District Code § 8.25; Cal. Harb. & Nav. Code § 522. Thus, it appears that the actions taken by the Port District in this case were the independent and authoritative acts of a final decision-maker. As a result, plaintiff has successfully demonstrated that there is at least a genuine issue of fact as to whether the Port District's seizure and destruction of the vessels were carried out pursuant to an official policy. The Port District's motion for summary judgment as to plaintiffs due process claim under section 1983 should therefore be denied.

c) Adequacy of State Remedies

The Port District also argues that plaintiffs section 1983 claim should be dismissed because there are adequate state remedies to protect her due process rights. As support for this argument, the Port District cites two Supreme Court cases which appear to limit due process claims brought under section 1983 when the state provides an adequate post-deprivation remedy. (Mem. ISO Summary Judgment at 8 (citing Hudson v. Palmer, 468 U.S. 517 (1984) and Parratt v. Taylor, 451 U.S. 527 (1981). However, in both Parratt and Hudson, the Court emphasized that the due process

deprivations were the result of random and unauthorized acts, not official policy. See Parratt, 451 U.S. at 541; Hudson, 468 U.S. at 533. Furthermore, in Zinermon v. Burch, 494 U.S. 113, 138-39 (1990), the Court explicitly stated that a section 1983 suit is available for the deprivation of due process if the harms resulted from an official government policy.

In this case, plaintiff has alleged that her due process rights were violated as a result of the Port District's policy allowing for the seizure and destruction of plaintiffs vessels. (See SAC ¶ 15.) Contrary to the Port District's characterization ofplaintiffs claims, the second amended complaint does not allege that the due process violations resulted from the random, unauthorized acts of the Harbor Police. Rather, it appears that plaintiff alleges that the agents directly responsible for the seizure and destruction of the vessels were acting pursuant to the established policy of the Port District. As a result, plaintiff is not barred from bringing a section 1983 claim for the alleged violation of his due process rights. See Parratt, 451 U.S. at 541.

d) Rocker-Feldman Doctrine

The Port District also argues that plaintiffs section 1983 claim should be dismissed pursuant to the Rocker-Feldman doctrine. The Rocker-Feldman doctrine is based on two Supreme Court cases which held that federal courts do not have jurisdiction pursuant to section 1983 to review

judgments and decisions of state courts. In Rocker v. Fidelity Trust Co., when the plaintiffs attempted to have a state court judgment declared "null and void," the Supreme Court ruled that federal district courts have no jurisdiction to "entertain a proceeding to reverse or modify" a state court judgment. 263 U.S. 413 (1923). In District of Columbia Court of Appeals v. Feldman, the Supreme Court again ruled that a district court has "no authority to review final judgments of a state court in judicial proceedings." 460 U.S. 462 (1983). The Supreme Court has subsequently explained that, according to the Rocker-Feldman doctrine, "a party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States Court based on the losing party's claim that the state judgment itself violates the loser's federal rights." Johnson v. DeGrandy. 512 U.S. 997,1005-06 (1994).

In this case, the Port District argues that all of plaintiffs causes of action, including the section 1983 claim, "arise" directly out of and are inextricably intertwined with the state court judgment which authorized the Port District to seize and destroy the Castle if plaintiff did not remove them from District lands. (See Judgment for Ejectment, Removal and Damages, Cal. Sup. Ct. Case No. 636966 (Mem. ISO Summary Judgment, Ex. B». The judgment states, in pertinent part:

> Defendants shall remove Neptune's Palace and the Castle (also known as Excalibur), from plaintiffs lands, and restore the land to plaintiff without the encroachment of Neptune's Palace and the Castle within thirty (30) days or on or before May 2, 1992...
>
> If defendants do not remove Neptune's Palace and the Castle by May 2, 1992, plaintiff may remove Neptune's Palace and the Castle from plaintiffs lands and recover the costs of removal and/or destruction.[5]

Plaintiff states that she moved the Castle in compliance with the state court's order after exhausting all possibilities for appellate review. (Morgan Decl. at 4; PI. 's Opp. at 6.) Thus, plaintiff argues that she complied with the state court's order and is not challenging its validity in the instant federal case. Plaintiff contends that the state court order only allowed the Port District limited authority to seize and/or destroy the Castle if it was not moved by May 2, 1992. According to plaintiff, once she complied with the state court's final order, the Port District no longer had any authority to seize or destroy the Castle.

While it is clear that there is an ongoing dispute between plaintiff and the Port District as to where the Castle should be anchored, the actual

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[5]In the state court proceedings, the Port District was the plaintiff and Kathleen Pierce and James Morgan were named defendants.

holding of the state court only authorized the Port District to remove and/or destroy the vessel plaintiff did not remove the vessels from a certain location by the court-ordered deadline. Plaintiff has submitted a sworn declaration from James Morgan, which states that he moved the vessels pursuant to the state court's order. As a result, while the current suit does not appear to be a challenge to the state court's previous order. Thus, the Port District's claim that plaintiffs suit is barred by the Rocker-Feldman doctrine is unpersuasive.

2. **Plaintiffs Third Cause of Action: Ordinance 2107 is Invalid**

According to plaintiff, the Port District seized and destroyed the vessels pursuant to Ordinance 2107, codified in the San Diego Port District Code at section 4.36. (SAC ¶ 19.) Section 4.36 sets forth regulations for the anchoring, mooring, towing, and docking of vessels in the A-8 anchorage of the south San Diego Bay. SDUPD Code § 4.36. Most significantly, section 4.36 contains three restrictions on the use of the A-8 anchorage: (I) it prohibits business or commercial enterprises in the A-8 anchorage; (2) it prohibits barges and floating docks in the A-8 anchorage, and (3) it prohibits vessels exceeding sixty-five feet in length from anchoring or mooring in the A8 anchorage without a special permit. rd. at § 4.36 (k).

The language of section 4.36 clearly gives the Port District power to regulate the use of the A-8 anchorage. However, plaintiff argues that section

4.36 is invalid because it amends the Port Master Plan, yet never received the requisite approval by the California Coastal Commission. (TAC ¶ 20.) In contrast, the Port District argues that section 4.36 is not an amendment to the Port Master Plan, but rather an example of the very type of regulation that the Port District is authorized to implement pursuant to the Port Master Plan.

The Port Master Plan created "anchorage areas" in the San Diego Bay to prohibit long-tern1 (i.e. permanent or semi-permanent) anchoring in the Bay that might interfere with short-term uses of the Bay for fishing, sailing, and other recreational activity. (See SDUPD Port Master Plan at 44, (Mem. ISO Summary Judgment, Ex. F).) The Port Master Plan explicitly states that the use or development of the A-8 anchorage "shall be at the discretion of the Port District." (Id.) Thus, the regulations set forth by section 4.36 appear to be not only permitted, but actually contemplated by the Port Master Plan.

Plaintiff argues that section 4.36 restricts use of the A-8 anchorage in a way not authorized by the Port Master Plan, since the Port Master Plan does not contain the three restrictions added in section 4.36(k). As a result, plaintiff argues that section 4.36 should be considered an amendment to the Port Master Plan, thereby requiring approval from the California Coastal Commission. However, because the Port Master Plan states that the use or development of the A-8 anchorage "shall be at the discretion" of the Port District, the Port District is

authorized to regulate the use of the A-8 anchorage. See SDUPD Port Master Plan at 44. A plain reading of the ordinance suggests that the Port District is entitled judgment as a matter of law as to the third cause of action. Moreover, plaintiff has submitted no evidence demonstrating that section 4.36 should be viewed as anything more than a regulation pursuant to the authority granted to the Port District through the Port Master Plan. Therefore, the Court grants the Port District's motion for summary judgment as to the third cause of action.

3. Plaintiffs Fourth Cause of Action: The Port District Lacked Authority to Destroy Plaintiff's Vessels

Plaintiff's fourth cause of action simply states, "San Diego Unified Port District Ordinance 2107 (codified at section 4.36] limits destruction of seized vessels to abandoned vessels. Plaintiff['s] vessels were not abandoned and thus their destruction by defendant San Diego Unified Port District was unlawful." In other words, plaintiff argues that, even assuming section 4.36 to be valid, the Port District deprived plaintiff of his due process rights by improperly seizing and destroying vessels that had not been "abandoned" under section 4.36.

Section 4.36(b)(2) defines "abandonment" as:

> Any hulk, derelict, wreck or parts of any ship, vessel, or other watercraft, sunk, beached or allowed to remain in an unseaworthy or dilapidated condition upon publicly owned submerged lands, salt marsh, or tidelands within the corporate limits of the District, without the consent of District... for a period of longer than thirty (30) days without a watchman or other person being maintained upon or near and in charge of the property.

In its motion for summary judgment, the Port District argues that the vessels were, in fact, "abandoned" pursuant to section 4.36(b)(2), and the Port District was therefore authorized to remove and/or destroy the vessels. (Mem. ISO Summary Judgment at 17.) Specifically, the Port District argues that the vessels were in an unseaworthy condition without the consent of the District. In support of its claim, the Port District has submitted a Vessel Report, dated January 29, 2002, which cites the Castle as being anchored in an unseaworthy condition for over two years. (Id. at Ex. L.) Based on this claim, the Port District argues that it is entitled to summary judgment on the fourth cause of action. (Id. at 17.)

Although the Vessel Report indicates that the Castle may meet the definition of "abandonment" within section 4.36, all pleadings and discovery must be read in the light most

favorable to the non-moving party on a motion for summary judgment. See Fed. R. Civ. Pro. 56(c). Since the Port District has submitted evidence tending to show that the Castle qualifies as an abandoned vessel under section 4.36, the burden shifts to plaintiff to demonstrate that there exists a genuine issue as to a material fact regarding abandonment. In this case, plaintiff has submitted evidence that the vessels were never abandoned because they were never left unattended for a period of thirty days or longer. Specifically, plaintiff has submitted the sworn declaration of James Morgan, who states, "I personally acted as watchman or personally observed others do so, more often than every 30 days." (Decl. of James Morgan at 5.)

Under section 4.36, it appears that a vessel must be without a watchman for at least a thirty-day period in order to be considered "abandoned." From the language of the statute, this requirement appears to be independent from any finding that a vessel is unseaworthy. At the very least, there is a triable issue as to whether the Vessel Report is sufficient to deem the Castle "abandoned," especially given that the Castle allegedly had a watchman on board during the time at issue.

Because the declaration speaks to facts within the personal knowledge of James Morgan, it is sufficient evidence to create a genuine issue for trial. The Ninth Circuit has explicitly stated that it is not the role of the court to weight the viability of

the evidence at the summary judgment stage of the proceedings. See Clicks Billiards. Inc. v. Six shooters. Inc., 251 F.3d 1252 (9th Cir. 200 I) ("On summary judgment, the district court is prohibited from weighing evidence and deciding issues of contested fact, because it is not the role of the district court at such stage to decide which party has the more compelling argument; rather, it is simply to determine whether a triable issue of fact exists."). Construing all facts in the light most favorable to plaintiff, the Court finds that she has submitted sufficient evidence to raise a triable issue of fact as to whether the vessels were "abandoned" under section 4.36. Accordingly, the Court denies the Port District's motion for summary judgment as to the fourth cause of action.

4. Plaintiffs Fifth Cause of Action: Violation of Harbors and Navigation Code

In the fifth cause of action, plaintiff alleges that the Port District's seizure and destruction of her vessels violated the California Harbors and Navigation Code (sections 500 et seq.) because the Port District failed to provide notice as required by the code. (SAC ¶ 25.) According to plaintiff, because the Port District failed to follow the requirements of the Harbors and Navigation Code, the seizure of the vessels was unlawful. The Port District's sole argument in response to plaintiffs fifth cause of action is that California Harbors and Navigation Code does not apply because the Castle is not a "vessel" as defined by that statute. (Mem. ISO

Summary Judgment at 15.)

California Harbors and Navigation Code section 21 states:

> "Vessel" includes ships of all kinds, steamboats, steamships, canal boats, barges, sailing vessels, and every structure adapted to be navigated from place to place for the transportation of merchandise or persons.

Cal. Harb & Nav. Code § 21. Although this definition appears to be quite broad, the Port District argues that the Castle is not a "vessel," but rather a structure. As support for this claim, the Port District points to a letter from the U.S. Coast Guard, which deemed the Castle "to have been taken out of navigation and made substantially a land structure, for purposes of the Coast Guard requirements detailed in Title 46 of the Code of Federal Regulations." (Letter to James Morgan from E.A. Hannes, Commander U.S. Coast Guard, dated June 22, 1984 (Mem. ISO Summary Judgment, Ex. G).) What the Port District fails to point out, however, is that the letter went on to state that "this designation will be rescinded should the nature of your activities in South San Diego Bay change." (Id.) As a result, it appears that the designation of the Castle as a "structure" rather than a "vessel" was based on the activities of the Castle at that time, and was subject to change.

To rebut the conclusion reached in the letter by Commander Hannes, plaintiff has submitted a

letter from D.P. Montoro, Commander, U.S. Coast Guard, dated November 16, 1990. (Supp. Decl. ofJames Morgan, Ex. C). The letter references the earlier letter from Coast Guard Commander Harmes, but reaches the exact opposite conclusion as to the Castle's categorization. Specifically, the letter states, "It is my opinion that the Excalibur [i.e. Castle] and the Neptune Palace are in fact vessels..." (Id.) The conflicting letters demonstrate that a genuine issue of material fact exists as to whether the Castle should be categorized as a "vessel" under California Harbors and Navigation Code section 21, or whether it should be labeled as a "structure." Because plaintiff has demonstrated a genuine factual dispute, the Court denies the Port District's motion for summary judgment as to plaintiff's fifth cause of action.

5. Plaintiff's Sixth Cause of Action: Failure to Comply with Ordinance 8.25

Plaintiffs sixth cause of action alleges that the Port District "failed to comply with the requirements of section 8.25 of the San Diego Unified Port District Code in that notices of seizure, demands for payment, and publication of sale were not given, and thus the destruction of the vessels was unlawful." (SAC ¶ 27.) In its motion for summary judgment, the only argument raised by the Port District with regard to plaintiff's sixth cause of action is that the Castle is not a"vessel" under Harbors and Navigation Code section 21. (Mem. ISO Summary Judgment at 15-16.) Because

plaintiff has established that there is a genuine issue of material fact as to whether the Castle should be categorized as a "vessel" or a structure, the Court denies the Port District's motion for summary judgment as to the sixth cause of action.

6. Plaintiffs Seventh Cause of Action: Section 8.25(a)(4) is Unconstitutional

Plaintiffs seventh cause of action alleges that section 8.25(a)(4) of the San Diego Unified Port District Code gives the Port District the "unfettered option to destroy [plaintiffs vessels] without notice or hearing." (SAC ¶ 29.) Plaintiff alleges that such unfettered discretion is a violation of the Due Process Clauses of both the Federal and California Constitutions. (Id.)

Section 8.25 grants the Port District the authority to remove watercraft from the San Diego Bay. SDUPD Code § 8.25. Specifically, section 8.25(a)(4) states that California Harbors and Navigation Code section 522(a) governs removal of watercraft where such watercraft are abandoned. Id. Harbors and Navigation Code section 522(a) states in pertinent part:

> Any hulk, derelict, wreck, or parts of any ship vessel, or other watercraft sunk, beached, or allowed to remain in an unseaworthy or dilapidated condition upon publicly owned submerged lands, salt marsh, or tidelands within the corporate limits of any municipal corporation or other public

> corporation or entity having jurisdiction or control over those lands, without its consent expressed by resolution of its legislative body, for a period of longer than 30 days without a watchman or other person being maintained upon or near and in charge of the property, is abandoned property.
>
> Thereafter, that municipal corporation or other public corporation or entity may, notwithstanding any other provision of law, take title to the abandoned property for the purposes of abatement without satisfying any property tax lien on that property, and also may cause the property to be sold, destroyed, or otherwise disposed of in any manner it determines is expedient or convenient.

Plaintiff argues that because section 522(a) authorizes the Port District to sell, destroy, or otherwise dispose of"abandoned" property in any manner it determines to be "expedient or convenient," it authorizes the Port District to destroy plaintiffs property without notice or hearing. (Pl.'s Opp. 10-11.) However, the Port District points out that Harbors and Navigation Code section 500 et seq. provides a statutory scheme of notices and hearings required prior to the removal and/or destruction of vessels. (Memo. ISO Summary Judgment at 19-20.) For example, sections 518 and 519 outline the notice requirements for the sale of wrecked vessels. Cal. Harb. & Nav. Cod §§ 518-519. Additionally, section

522(b) provides that if the owner of an "abandoned" vessel claims the vessel, the Port District may not destroy the property without first providing the owner fifteen days notice to remove the property from Port lands. Id. at § 522(b). These notice requirements demonstrate that the discretion granted to the Port District in section 8.25 is not without limitation. Thus, plaintiffs claim that section 8.25 is unconstitutional because it fails to provide due process safeguards fails as a matter of law. As a result, the Court grants the Port District's motion for summary judgment as to the seventh cause of action.

7. Plaintiffs Eighth Cause of Action: Defective Notice Before the Port District Destroyed Vessels

Plaintiffs eighth cause of action alleges that the Port District failed to provide adequate notice prior to seizing and destroying plaintiffs vessels. (SAC ¶ 31.) Specifically, plaintiff alleges that the notices were defective because they did not comply with the San Diego Unified Port Code, and they made reference to inapplicable code sections pertaining to plaintiffs potential remedies. (Id.) The Port District has not submitted any evidence to the Court demonstrating that it complied with the pertinent notice requirements prior to removing and destroying the vessels. In fact, in its moving papers, the Port District does not even address plaintiffs eighth cause of action with any specificity. As a result, the Court denies the Port District's motion for summary judgment as to plaintiffs

eighth cause of action.

8. Plaintiffs Ninth Cause of Action: Negligence under California Government Code 815.2

Plaintiffs ninth cause of action alleges that the Port District was negligent in seizing and destroying the vessels. As a result, plaintiff alleges that the Port District is liable for monetary damages under California Government Code section 815.2. (SAC ¶ 33.)

In its motion for summary judgment, the Port District argues that plaintiffs ninth cause of action should be dismissed because both the Port District and its employees are immune from tort liability under California Government Code section 820.4. (Mem. ISO Summary Judgment at 23.) In support of its immunity argument, the Port District cites Sava v. Fuller, 249 Cal.App.2d 281 (Cal. Ct. App. 1967). Sava held that a public entity is immune from liability when the alleged tort resulted from the discretionary act of its employee. Id. at 284. However, the Sava court stated that the key inquiry in determining immunity involved the statutory meaning of the words, "exercise of discretion invested in [the employee]." Id.; see also, Cal. Govt. Code § 820.2. In analyzing this issue, Sava found that discretionary acts are those involving the exercise of judgment, including acts "incidental and collateral to the performance of the principal purpose of a public employee's office." Sava, 249 Cal.App.2d at 287 (citing Glickman v.

Glasner, 230 Cal.App.2d 120 (Cal. Dist. Ct. App. 1964)).

A careful reading of Sava suggests that the Port District's reliance on its holding is misplaced. In Sava, the court held that when an employee acts pursuant to a mandatory grant of authority, neither the employee nor the public entity can be shielded by immunity. rd. at 291. Therefore, if a statute authorizes an employee to take a given action, the performance of such action is not discretionary, and therefore does not gamer immunity.

In this case, section 522 of the Harbors and Navigation Code, as well as section 8.25 of the Port District Code, authorize the Port District to remove and/or destroy abandoned vessels. See SDUPD Code § 8.25; Cal. Harb. & Nav. Code § 522. Additionally, sections 523 and 524 of the Harbors and Navigation Code provide additional authority for employees to remove vessels in other circumstances. Cal. Harb. & Nav. Code §§ 523-524. As a result, it appears that the seizure and destruction of plaintiffs vessels was done pursuant to a mandatory grant of authority. Such an act would be carried out at the direction of the Port District, pursuant to its official policy, rather than through the discretion of individual police officers. As a result, a genuine issue of material fact exists as to the question of whether the seizure and destruction of plaintiffs vessels was an act of discretion, or whether it was pursuant to mandatory Port District policy (i.e. not involving the exercise of discretion). See, e.g. Wallis v.

Spencer, 202 FJd 1126 (S.D. Cal. 2000) (reaching a similar conclusion as to summary judgment in a police discretion case); see also, Ogborn v. City of Lancaster, 124 Cal.Rptr.2d 238 (Cal. Ct. App. 2002). The Court therefore denies the Port District's motion for summary judgment as to the ninth cause of action.

CONCLUSION

For the foregoing reasons, the Court **GRANTS** the Port District's motion for summary judgment only as to: (1) plaintiffs first cause of action for alleged violations of the Equal Protection Clause of the Fourteenth Amendment; (2) plaintiffs third cause of action; and (3) plaintiffs seventh cause of action. The Court **DENIES** the Port District's motion for summary judgment as to the remaining causes of action.

IT IS SO ORDERED.

Dated: February 2, 2005

/s/
HON. IRMA GONZALEZ,
Chief Judge, United States
District Court

cc: Magistrate Judge Anthony J. Battaglia
All Parties

APPENDIX D - ORDER GRANTING THE SAN DIEGO UNIFIED PORT DISTRICT'S MOTION FOR SUMMARY ADJUDICATION AS TO KATHLEEN PIERCE'S AND MATTHEW MORGAN'S DUE PROCESS CLAIMS DATED JULY 7, 2006 AND FILED JULY 10, 2006

UNITED STATES DISTRICT COURT

SOUTHER DISTRICT OF CALIFORNIA

KATHLEEN PIERCE, MATHHEW MORAGN AND JAMES WARD,

Plaintiffs,

v.

SAN DIEGO UNIFIED PORT DISTRICT, and Does 1 through 100, Inclusive.

Defendant.

CASE NO. 03CV172 IEG (AJB),
consolidated with 03CV171 AND 04cv1695

ORDER GRANTING THE SAN DIEGO UNIFIED PROT DISTRICT'S MOTION FOR SUMMARY ADJUDICATION AS TO KATHLEEN PIERCE'S AND MATTHEW MORGAN'S DUE PROCESS CLAIMS

[Doc. No. 86]

Presently before the Court is defendant San Diego Unified Port District's (the "Port District")

motion for summary adjudication of Kathleen Pierce's and Matthew Morgan's (hereinafter referred to as "plaintiffs.")1 due process claim. For the reasons stated below, the Court grants the Port District's motion.[6]

BACKGROUND

A. Factual Background

This case arises from a dispute regarding a recreational boat rental business on the south San Diego Bay. In 1984, James Morgan Sr. completed the construction of a floating barge nicknamed "the Castle," a two-story barge designed to look like a medieval castle. (PI. Ex. A.) Plaintiffs constructed the Castle on the hull of a 1967 Uniflite cruiser, which plaintiffs had registered with the DMV. (*Port*

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[6] There is some confusion in the Port District's motion as to whether the Port District moves for summary judgment solely against Matthew Morgan or against Matthew Morgan and Kathleen Pierce. While Kathleen Pierce's name appears in the motion's caption, the motion primarily discusses the third amended complaint filed by Matthew Morgan in the consolidated case 03cv 171. The Court construes the Port District's motion as a summary judgment against both Morgan and Pierce for two reasons. First, the presence of Kathleen Pierce's name in the motion caption combined with the motion's use of the plural term "plaintiffs" provides Pierce with ample notice that the Port District seeks summary judgment against her. The Court proceedings involving substitution of Gregory Garrison as lawyer for both Pierce and Morgan, provided additional notice to Pierce that the Port District was moving for summary judgment against her. Furthermore, Pierce's second amended complaint and Morgan's third amended complaint are identical in almost every respect and it is more efficient for the Court to address both complaints together.

Ex. BB; PI. Ex. D.) The Castle was designed to be anchored in a large protected body of water with smaller vessels transporting visitors to and from shore. (Id.) Around the time of its completion, the Castle was appraised at $970,000. (Id. at 2.)

Plaintiff Kathleen Pierce held a security interest in the Castle. (Second Amended Complaint ("Pierce SAC") ¶ 9.) Matthew Morgan has an ownership interest in the Castle. [Doc. No. 72 in 03cv171.]

For some period of time, the Castle was anchored in or near the A-8 anchorage area in central San Diego Bay. (PI. Ex. G.) In 2001, the Port Authority developed an "Operation Plan for Removal of Vessels From A-8 Anchorage." (Id.) The plan found that "the Area of South San Diego bay has become an area of Hazards to Navigation and Environmental Concern" and proposed, *inter alia*, the removal of the Castle to mitigate these problems. (Id.)

On January 22, 2002, the Port District seized the Castle for violation of District Code § 4.35. (PI. Ex. 1.) (stating "This vessel was identified in violation of Port District Ordinance 4.35(c).6 UPD. The vessel was anchored for over two years in an unseaworthy condition. The vessel was removed per 8.25(a) 1 UPD to 24th St. Marine Tenninal.") On February 4,2002, watchman James Morgan Sr. sent a letter to the Port Director requesting information on how to redeem the Castle. (PI. Ex. N.)

In March 2002, the Port District responded to James Morgan Sr., informing him that "the owner of the Castle may come and claim it at any time upon presentation of proof of ownership and after payment of all impound, towing and storage fees." (Port Ex. EE.)

In June 2002, the Port District destroyed the Castle. (PI. Ex. A.)

B. Procedural Background

As a result of the alleged seizure and destruction of the vessels[7] in January 2002, plaintiffs filed a claim with the Port District for recovery of damages on June 28, 2002. (Pierce SAC ¶ 8; Morgan Third Amended Complaint (TAC) ¶ 8.) The Port District denied plaintiffs' claim. (Pierce SAC ¶ 8; Morgan TAC ¶ 8.) Thereafter, on January 27, 2003, plaintiffs filed separate complaints in this Court against the Port District.

With one exception, the complaints contained the same claims. The first cause of action alleged that the Port District's "seizure and destruction" ofthe vessels deprived plaintiffs of rights secured by the Constitution in violation of 42 U.S.C. § 1983. (Pierce SAC ¶ 15; Morgan TAC ¶ IS.) Pierce's second cause of action alleged a conspiracy to violate civil rights in violation of 42 U.S.C. § 1985.

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[7]Plaintiffs complaint pertains to the destruction of the Castle as well as several support vessels

Morgan's TAC notes that this cause of action had been dismissed in a prior order and states that Morgan declines to re-allege the claim. (Pierce SAC ¶ 17; Morgan TAC ¶ 17.) The third cause of action in both complaints alleged that Ordinance 2107 was invalid. (Pierce SAC ¶ 20; Morgan TAC ¶ 20.) The fourth cause of action alleged that the Port District did not properly apply Ordinance 2107 because the Ordinance only allows destruction of abandoned vessels and the Castle was not abandoned. (pierce SAC ¶ 23; Morgan TAC ¶ 23.) The fifth cause of action alleged that the Port District did not follow the procedures for notice mandated by California Harbors and Navigation Code § 500 *et seq.* (pierce SAC ¶ 25; Morgan TAC ¶ 25.) The sixth cause of action alleged that the Port District failed to follow the notice requirements of the San Diego Unified Port District Code § 8.25. (Pierce SAC ¶ 27; Morgan TAC ¶ 27.) The seventh cause of action alleged that San Diego Unified Port District Code § 8.25 was unconstitutional. (Pierce SAC '129; Morgan TAC ¶ 29.) The eighth cause of action alleged the notification allegedly provided by the Port District misinformed plaintiffs as to their remedies. (Pierce SAC ¶ 31; Morgan TAC ¶ 31.) The ninth cause of action alleged negligence. (Pierce SAC ¶ 33; Morgan TAC ¶ 33.)

The Court has dismissed Pierce's second cause of action for violation of 42 U.S.C. § 1985. [Doc. No. 30 in 03cv172.] The Court granted the Port District summary adjudication as to plaintiffs' third cause of action alleging that Ordinance 2107 is invalid. [Doc. No. 69 in 03cv172; Doc. No. 72 in

03cv171.] The Court granted the Port District summary adjudication as to plaintiffs' seventh cause of action alleging that Port District Code § 8.25 was unconstitutional. [Doc. No. 69 in 03cvl72; Doc. No. 72 in 03cv171.] Finally, the Court narrowed plaintiffs' first cause of action, for violation of 42 U.S.C. § 1983, by granting the Port District summary adjudication as to plaintiffs' equal protection claims. [Doc. No. 69 in 03cvl72; Doc. No. 72 in 03cv171.]

Plaintiffs appear to have two causes of action remaining: [I] a 42 U.S.C. § 1983 claim alleging that the Port District seized plaintiffs' property without due process and [2] a negligence claim.[8]

On March 13,2006, the Court consolidated Kathleen Pierce's case (03cvl72), Matthew Morgan's case (03cvI71) and James Ward's case (04cvI695). [Doc. No. 82 in 03cvl72.]

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[8]Plaintiffs' fourth, fifth, sixth and eighth claims allege various violations of state and local laws. However, plaintiffs have not furnished any authority indicating that these violations give rise to private rights of action. In California, "except as otherwise provided by statute," a public entity "is not liable for an injury, whether such injury arises out ofan act or omission of the public entity or a public employee or any other person." California Government Code § 815. "Hence, except as required by the federal or state constitutions... liability must be based on a California statute." Witkins, Vol. 5, § 223 (2005)(citing to Sava v. Fuller, 249 Cal. App.2d 281 (Cal. Ct. App. 1967)). The Court it is not aware of any California statutes rendering these claims valid grounds for recovery.

On April 4, 2006, the Port District filed the present motion for summary adjudication on Kathleen Pierce's and Matthew Morgan's due process claims. [Doc. No. 87 in 03cv172.]

On April 20, 2006, all three plaintiffs obtained new counsel, Gregory Garrison. On May 15, 2006, the Court continued the hearing for summary adjudication to June 19, 2006. [Doc. No. 104.]

On June 5, 2006, plaintiffs Pierce and Morgan filed their opposition to the Port District's motion for summary adjudication [Doc. No. 107.]

LEGAL STANDARD

"Under Rule 56(c), summary judgment is proper when the pleadings and discovery, read in the light most favorable to the nonmoving party, demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Armstrong v. Burlington Northern R. Co., 139 F.3d 1277. 1278 (9th Cir. 1998) (quoting 20th Century Ins. Co. v. Liberty Mut. Ins. Co., 965 F.2d 747, 750 (9th Cir. 1992)); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is "genuine" when "the evidence presented is such that a jury applying [the appropriate] evidentiary standard could reasonably find for either the plaintiff or the defendant." Anderson, 477 U.S. at 255.

Once the moving party meets the

requirement of Rule 56, the burden shifts to the party resisting the motion, who "must set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 256. It is not enough for the party opposing a properly supported motion for summary judgment to "rest on mere allegations or denials of his pleadings." rd. Genuine factual issues must exist that "can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." rd. at 250. To make such a showing, the nonmoving party must go beyond the pleadings to designate specific facts showing that there is a genuine issue for tria1. Celotex Com. v. Catrett, 477 U.S. 317, 325 (1986). The requirement that a nonmoving party go beyond the pleadings is meant to further one of Rule 56's principal purposes, namely "to isolate and dispose of factually unsupported claims or defenses." Id. at 323-24.

DISCUSSION

A. Plaintiffs' Due Process Claim

Plaintiffs' first cause of action alleges deprivations of constitutional rights in violation of 42 U.S.C. § 1983. Section 1983 creates a cause of action against any person who, acting under color of state law, abridges rights created by the Constitution and laws of the United States. 42 U.S.C. § 1983. In their respective complaints, plaintiffs merely allege that the Port District's "seizure and destruction of the 'vessels' under color or (sic) law deprived plaintiff of rights secured by

the Constitution and laws in violation of 42 U.S.C. 1983." (pierce SAC ¶ 15; Morgan TAC ¶15.) In their opposition to the Port District's motion for summary adjudication, plaintiffs focus their 42 U.S.C. § 1983 claim on the contention that the Port District denied them due process when, in the process of disposing of the Castle, it violated various Port and state statutes. (Opp. at 10.) ("In fact, the PORT violated its own ordinances and the statutory notice requirements of the Harbors and Navigation code as shown below. As a result, the PORT violated PLAINTIFFS' due process rights under 42 United States Code section 1983.") A "procedural due process claim hinges on proof of two elements: (1) a protectible liberty or property interest...; and (2) a denial of adequate procedural protections." Foss v. Nat'l Marine Fisheries Serv., 161 F.3d 584, 588 (9th Cir.1998).

The Port District moves for summary adjudication on plaintiffs' due process claim on the ground that it has furnished adequate procedural protections by providing "notice to plaintiffs of the seizure of the vessels and opportunity for a post storage hearing, and plaintiffs had actual and constructive notice of the seizure of the vessels." (Memo. ISO Motion at 4.) The Port District further argues that it has followed all relevant state and District regulations. (Id.)

1 The Seizure

The uncontested facts before the Court indicate that plaintiffs' challenges to the initial

seizure of the Castle lack merit. It is uncontested that at the time of seizure, the Castle was in violation of United Port District Code (UPD) § 4.35, which prohibited unauthorized anchoring in central San Diego Bay. (Opp. at 5-6.) Plaintiffs contend that the Port District did not have authority to seize the Castle because UPD § 4.35 only authorizes the Port District to seek a civil injunction to enforce the ordinance.[9] (Opp. at 11.) This is incorrect. As indicated in its vessel report, the Port District seized the Castle pursuant to UPD § 8.25, which provides for the impoundment of"any vessel, watercraft or object found in violation of any Federal or state law or provision of this Code." (PI. Ex. 1; UPD § 8.25.)[10] The Port District amended UPD § 8.25 to apply to UPD § 4.35 violations on September 4, 2001, before the events giving rise to this lawsuit. (Port Ex. AA.) Thus, the Port District's initial seizure of the Castle was entirely lawful and in compliance with the requirements of due process.

II. Post-Seizure Actions and the Destruction of the Castle

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[9] Plaintiffs do not challenge the Port District's failure to provide a pre-seizure hearing, but the Court notes that the seizure of a vehicle in violation of a law does not usually require a pre-seizure hearing. See Breath v. Cronvich, 729 F.2d 1006 (5th Cir. 1984); Sutton v City of Milwaukee, 672 F.2d 644 (7th Cir. 1982); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

[10] The Court takes judicial notice of the complete text ofUPD § 8.25.

The Port District's conduct during the post-seizure period also cannot support a due process claim. Plaintiffs contend that the Castle was registered with the DMV and, therefore, Harbor and Navigation Code § 500 *et. seq.* dictated the notice and disposition procedures that the Port District had to follow regarding the Castle. In plaintiffs' view, the Port District failed to follow several significant procedures mandated by Harbor and Navigation Code § 500 *et seq.* Section 522, entitled "Abandoned hulks within municipal limits, disposition, claim of ownership; fee" allows the Port District to destroy a vessel when it is "abandoned." Harbor and Navigation Code § 522(a). But, where a "registration number appears on the watercraft, the municipal corporation or other public corporation... shall send the notice to the last registered owner and the disposition shall be handled as a lien sale under Section 504." Harbor and Navigation Code § 522(b). Plaintiffs allege that the Port District violated these code provisions by destroying the Castle without conducting a lien sale.

Furthermore, section 526 imposes several procedural safeguards before the disposition of an abandoned vessel. Specifically, section 526 requires the Port District, *inter alia,* to appraise an abandoned vessel before destruction and send notice of removal within 48 hours of removal to the owner, legal owner and any other person known to have an interest in the property. If the Port District can not find the registered or legal owner, it must publish notice of removal for at least two weeks in

succession in one or more daily papers. Harbor and Navigation Code § 526. Plaintiffs allege that the Port District did not appraise the Castle, did not send notice of removal to all interested parties and did not, in the alternative, publish notice of removal in a daily paper. (Opp. at 16-17.)

A government agency's failure to follow its own regulations can be a due process violation. See e.g. The Govt. of the Canal Zone v. Arnold Brooks, 427 F.2d 346, 347 (5th Cir.1970)("It is equally well established that it is a denial of due process for any government agency to fail to follow its own regulations providing for procedural safeguards to persons involved in adjudicative processes before it."); Smith v. State of Georgia, 684 F.2d 729, 733 (II th Cir. I982)(noting that the "disregard for state procedures may support a constitutional claim."); Antonuk v. United States, 445 F.2d 592 (6th Cir. 1971.)

However, in this case, plaintiffs cannot show a failure to follow state or local ordinances because the provisions of the Harbor and Navigation code they point to do not bind the Port District. Harbor and Navigation Code § 500 *et seq.* is commonly known as the "Boaters Lien Law" and provides procedures for parties holding possessory liens against boats to recover their interest by forcing a lien sale. See Harbor and Navigation Code § 500 *et seq,* Sections 522 and 526 of the Harbor Code give public entities authority to dispose of abandoned vessels in accordance with the procedures provided therein. However, nothing in Sections 522 or 526, or

elsewhere in the Harbor Code § 500 *et seq.*, purports to limit a public entity's authority to dispose of boats taken into custody for other reasons.

Likewise, UPD § 8.25 does not require the Port District to conduct a lien sale for every registered boat impounded for some reason. While it is true that UPD § 8,25(5) states that Harbor and Navigation Code § 500 shall apply to vessels registered with the DMV, this simply means that third parties with interests in impounded boats may conduct lien sales to satisfy their interests. UPD § 8.25(4) addresses the Port District's authority to dispose of vessels and the procedures that must be followed:

> "If the owner or agent of any such vessel, watercraft or object cannot be found within Thirty (30) days, or refuses upon demand to pay the lawful costs and expenses as provided above, the District may sell the property at public auction after publication of the sale is advertised in a newspaper of general circulation at least Five (5) days prior thereto, *or the District may keep, destroy or otherwise dispose of such property.*" (emphasis added)

The Port District complied with its procedures as mandated in UPD § 8.25. On March 19, 2002, the Port District sent James Morgan a letter informing him that "the owner of the Castle may come and claim it at any time upon presentation of proof of ownership and after

payment of all impound, towing, and storage fees incurred as of the date ofretrieval." (Port Ex. EE.) Apparently, plaintiffs did not attempt to retrieve the Castle by paying the impound, towing and storage fees owed within thirty days, Thus, the Port District had authority under UPD § 8,25 to destroy the Castle.

CONCLUSION

The loss of something as unique as the Castle is obviously difficult for its owners and for James Morgan, who worked to build the Castle many years ago. However, plaintiffs do not have a viable due process claim against the Port District. Plaintiffs allege that the Port District did not follow its own procedures in disposing of the Castle, but the undisputed facts indicate that the Port District did, in fact, comply with its procedures, The Port District had authority to impound the Castle, under UPD § 8.25, because the Castle was in violation ofUPD § 4.35. Since 2001, contrary to plaintiffs' assertion, the Port District had authority under UPD § 8.25 to impound vessels found to violate UPD § 4.35. Furthermore, the Port District was not required to conduct a lien sale of thc Castle because it had authority under UPD § 8.25 to destroy a vessel after thirty days when the owner of that vessel refused to pay the impound, towing and storage fees associated with the Port District's seizure.

For these reasons, the Court **GRANTS** the Port District summary adjudication on plaintiff

Kathleen Pierce's and plaintiff Matthew Morgan's due process claims. Only a negligence claim remains for these two plaintiffs. The parties **SHALL** contact Magistrate Judge Battaglia forthwith to schedule a settlement conference concerning this final claim.

IT IS SO ORDERED.

Dated: July 7, 2006

/S/
HON. IRMA E. GONZALEZ, Chief Judge, United States District Court, Southern District of California

cc: Magistrate Judge Anthony J. Battaglia
All parties

APPENDIX E - ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DATED AND FILED DECEMBER 6, 2006

UNITED STATES DISTRICT COURT

SOUTHER DISTRICT OF CALIFORNIA

KATHLEEN PIERCE, et al., Plaintiffs, v. SAN DIEGO UNIFIED PORT DISTRICT, et al. Defendants.	CASE NO. 03CV172 IEG (AJB), *consolidated with* 03CV171 **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** [Doc. No. 133]

Presently before the Court is San Diego Unified Port District's ("defendant") motion for judgment on the pleadings, which this Court treats as a motion for summary judgment. For the reasons stated herein, the Court grants defendant's motion.

BACKGROUND

A. Factual Background

In its recent Order denying plaintiffs' motion to dismiss and treating defendant's motion for

judgment for pleadings as a motion for summary judgment, the Court adequately discussed the facts giving rise to this litigation. [See Doc. No. 148, at 1-2.]

B. Procedural Background

In its recent Order denying plaintiffs' motion to dismiss and treating defendant's motion for judgment for pleadings as a motion for summary judgment, the Court adequately discussed the procedural history of this litigation, including the consolidation of the Pierce and Morgan cases, prior to the oral argument on defendant's motion on October 16, 2006. [Id., at 3-5.] That prior discussion explained that plaintiffs have one negligence cause of action in remaining; this Court has dismissed or granted summary judgment to defendant on all other causes of action.

At oral argument on the present motion, plaintiff's counsel alleged that defense counsel brought up new arguments in the reply brief. Defense counsel counter-alleged that plaintiff's counsel argued new theories of negligence liability in the opposition. Therefore, the Court ordered that each party file supplemental briefs on the new issues raised in the reply and opposition. [Id., at 11-12.] Pursuant to Federal Rule of Civil Procedure 12(c), the Court also found that it would treat the motion for judgment on the pleadings as a motion for summary judgment. [Id., at 10-12.]

On November 8, 2006, plaintiffs filed their

supplemental opposition brief. [Doc. No. 150.] On November 15, 2006, defendant filed its surreply. [Doc. No. 151.] The matter is now fully briefed and ready for decision.

DISCUSSION

A. Summary Judgment Standard

"Under Rule 56(c), summary judgment is proper when the pleadings and discovery, read in the light most favorable to the nonmoving party, demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Armstrong v. Burlington N. R.R. Co., 139 F.3d 1277, 1278 (9th Cir. 1998) (quoting 20th Century Ins. Co. v. Liberty Mut. Ins. Co., 965 F.2d 747, 750 (9th Cir. 1992)); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is "genuine" when "the evidence presented is such that a jury applying [the appropriate] evidentiary standard could reasonably find for either the plaintiff or the defendant." Anderson, 477 U.S. at 255.

Once the moving party meets the requirement of Rule 56, the burden shifts to the party resisting the motion, who "must set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 256. It is not enough for the party opposing a properly supported motion for summary judgment to "rest on mere allegations or denials of his pleadings." Id. Genuine factual issues must exist that "can be resolved only

by a finder of fact because they may reasonably be resolved in favor of either party." Id. at 250. To make such a showing, the nonmoving party must go beyond the pleadings to designate specific facts showing that there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

B. Applicable Law

"In order to prevail in an action based upon a defendant's alleged negligence, a plaintiff must demonstrate [1] that the defendant owed the plaintiff a legal duty, [2] that the defendant breached the duty, and that the breach [3] was a proximate or legal cause [4] of [plaintiff's] injuries." Morris v. De La Torre, 36 Cal. 4th 260, 264 (Cal. 2005). Under the California Tort Claims Act, public entities are liable only by statute and the state and federal constitutions; all common-law liability is abolished. Cal. Govt. Code § 815(a) & Senate Legislative Committee Comment; Peterson v. S.F. Cmty. Coll. Dist., 36 Cal. 3d 799, 809 (Cal. 1984); Forbes v. County of San Bernardino, 101 Cal. App. 4th 48, 53 (Cal. Ct. App. 2002). As a statutory basis for liability in this case, plaintiff cites California Government Code § 815.6:

> Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it

exercised reasonable diligence to discharge the duty.

Whether a statute creates a mandatory duty is a legal question appropriate for this Court to decide. Creason v. State Dep't of Health Services, 18 Cal. 4th 623, 631 (Cal. 1998). A plaintiff must establish three elements for a court to find that defendant was under a mandatory duty. The first "and foremost" element is that the statute's language must "be obligatory, rather than merely discretionary or permissive, in its directions to the public entity; it must require, rather than merely authorize or permit, that a particular action be taken or not taken." Haggis v. City of Los Angeles, 22 Cal. 4th 490, 498 (Cal. 2000) (citing Morris v. County of Marin, 18 Cal. 3d 901, 907 (Cal. 1977)) (emphasis in the original). The language must provide a "clear intent to mandate" government action "without the exercise of discretion or judgment." Id. at 506. Even when a statute uses the word "shall," a court may still find "apparently obligatory language was not intended to foreclose a government entity's exercise of discretion." Walt Rankin & Associates, Inc. v. City of Murrieta, 84 Cal. App. 4th 605, 614 (Cal. Ct. App. 2000).

Where a statute contains "quite general and broad" language that is "subject to considerable interpretation," the legislature does not intend "to open the courts to wide-ranging claims" of liability. Creason, 18 Cal. 4th at 634. In Creason, the California Supreme Court addressed a statute requiring that medical testing procedures "be

accurate," "provide maximum information" and "produce results that are subject to minimum misinterpretation." Id. at 632. The court held the statute did not create a mandatory duty, but instead gave the state discretion to develop the testing procedures for particular medical conditions. Id. at 631. Similarly, where a statute required the California Department of Justice to "determine[]" whether a would-be gun purchaser was eligible to purchase the gun, the court rejected the plaintiff's claim that the statute imposed a mandatory duty to conduct the investigation in a particular way. Gray v. S.F. Gun Exch., 207 Cal. App. 3d 151, 155-56 (Cal. Ct. App. 1989), superseded by statute on other grounds as stated in Braman v. California, 28 Cal. App. 4th 344 (Cal. Ct. App. 1994). Because the legislature did not specify the type of investigation required, the court determined that the manner of conducting the investigation fell within the department's discretion. Id. at 156.

The second element is that the statute's mandatory duty "be 'designed' to protect against the particular kind of injury the plaintiff suffered." Haggis, 22 Cal. 4th at 499. Third, the breach of the mandatory duty must be the proximate cause of plaintiff's injury. Walt Rankin, 84 Cal. App. 4th at 614.

C. Analysis

Applying the law of negligence to these facts, two of the elements are undisputed. This Court has

previously found that the plaintiffs suffered an injury when they lost their unique property interests (i.e., the boats). [Doc. No. 122, at 8.] The defendant's actions in destroying the boats were the undisputed proximate cause of the plaintiffs' loss. [Opp. to MJP, at 10.] The parties vigorously dispute, however, the scope of the duty defendant owed to plaintiffs, and whether defendant breached that duty during the impoundment and destruction of plaintiffs' boats. To determine the scope of the duty owed, the Court must apply California Government Code § 815.6 to determine whether defendant was under a mandatory duty.

Under these facts, plaintiffs argue that subsections (3),[11] (4),[12] and (5)[13] of Port District Code

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[11]"The registered and legal owners of record, or the agent of any such vessel, watercraft or object so removed and impounded shall have the right to secure the release of such vessel, watercraftor object after furnishing proof of such ownership to the District and after payment to the District of the costs and expenses for such removal, impound and storage."

[12]"If the owner or agent of any such vessel, watercraft or object cannot be found within Thirty (30) days, or, refuses upon demand to pay the lawful costs and expenses as provided above, the District may sell the property at public auction after publication of the sale is advertised in a newspaper of general circulation at least Five (5) days prior thereto, or, the District may keep, destroy or otherwise dispose of such property."

[13]"Harbors and Navigation Code Section 500 et seq. shall apply to the disposition of vessels registered with the Department of Motor Vehicles. Nothing herein shall relieve the owner of such vessel, watercraft or object or the person responsible for such vessel, watercraft or object from independent personal liability for such costs and expenses and

§ 8.25(a) all impose mandatory duties on defendant. Plaintiffs further allege two breaches of these mandatory duties. First, defendant allegedly acted unreasonably when it elected to destroy the boats, rather than conduct an auction. [Opp. to MJP, at 7.] According to plaintiffs, because defendant knew various buyers were interested in purchasing the Castle,[14] a public auction "was the only reasonable disposition under the circumstances." [Id., at 8.] In other words, among the courses of action that defendant was authorized to take under Code section 8.25(a), defendant unreasonably chose destruction.

Plaintiffs allege a second breach when defendant's lawyer purportedly did not include enough specific details in response to James Morgan's letter of February 4, 2002. Morgan wrote to the defendant's director asking (1) the defendant's position on an arrangement to purchase the Castle and (2) the amount of the impound fees

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any such owner or person responsible shall remain so liable."

[14] For this proposition, plaintiffs have lodged with the Court an inter-office memorandum between defendant's officials. [Pls. Ex. A.] While acknowledging communications with interested buyers, the memorandum recommends against sale of the Castle because of its "deteriorated condition." [Id. (noting the "rusted and corroded" hulls and "rotted and literally falling apart" structure, and warning of the liability risk associated with selling the Castle in this condition at public auction).]

as of February 15. [Pls. Ex. B.] On February 21, Ellen Faye Gross, the defendant's deputy attorney, mailed a responsive letter to Morgan stating that defendant would look into the answers to both questions. [Pls. Ex. C.] On March 19, Gross mailed Morgan a second letter stating that Morgan's letter was forwarded to defendant's board "for any response they may have." [Id.] Gross also informed Morgan that the owner of the Castle could reclaim the boat at any time by presenting proof of ownership to defendant and paying all impoundment-related fees "incurred as of the date of retrieval." [Id.] Finally, Gross indicated that the Castle would be destroyed if no one claimed the Castle and paid all fees by April 1. [Id.] However, at no time did Gross or another employee of defendant provide Morgan with the exact amount of impoundment fees owed as of February 15, 2002.

Under these facts, the Court finds that none of the three Port District Code sections cited by plaintiffs gave rise to a "mandatory duty" within the meaning of Government Code § 815.6. The right to secure the release of an impounded vessel under § 8.25(a)(3) arises only after the vessel's owner or agent presents proof of ownership to defendant and pays all fees related to removal, impoundment, and storage. Under the undisputed facts, defendant received neither proof of ownership of The Castle nor payment of the fees for its removal, impoundment, and storage. Defendant only received an inquiry regarding the amount of impoundment fees owed as of a particular date; this inquiry contained neither proof of ownership nor

actual payment. Therefore, the defendant owed no duty–mandatory or otherwise–to make the Castle available for redemption.

As to § 8.25(a)(4), the Court finds that whether to destroy The Castle or conduct a public auction was a decision completely within defendant's discretion. The section clearly says that defendant "may sell" or "may . . . destroy" an impounded vessel. Plaintiffs can point to no mandatory language limiting the defendant's discretion in situations where there are outstanding offers to purchase an impounded vessel.[15]

The power to sell or destroy an impounded vessel under § 8.25(a)(4) does depend either on defendant's inability to locate the vessel's owner or agent within thirty days of impoundment, or the owner or agent's "refus[al] upon demand" to pay the fees for removal, impoundment, and storage. However, these prerequisites did not impose a mandatory duty on defendant to provide James Morgan with an exact amount of impoundment fees owed as of a particular date. Assuming tat defendant understood James Morgan to be the

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[15]The case on which plaintiffs rely is distinguishable because that statute included the word "shall." N.V. Heathorn, Inc. v. County of San Mateo, 126 Cal. App. 4th 1526, 1532 (Cal. Ct. App. 2005). Where Port District Code § 8.25(a)(4) discusses the District's decision to destroy an impounded vessel or sell it at auction, the word "shall" does not appear.

owner of the Castle or the owner's agent,[16] defendant was merely required to "demand" the payment of impoundment fees before destroying or auctioning away the Castle. Nothing in the ordinance says that the demand requirement must include a statement of the total amount of fees owed. If the Port Commissioners intended for the Port District to follow a certain procedure in making demand, they could have stated the procedure in the ordinance. See Gray, 207 Cal. App. 3d at 156 (failure to specify a certain procedure was interpreted to leave the matter to the agency's discretion). The Court declines to amend the ordinance to specify the type of demand defendant must make. See Estate of Griswold, 25 Cal. 4th 904, 917 (Cal. 2001) (a court "may not, under the guise of interpretation, insert qualifying provisions not included in the statute").

Finally, the Court finds no mandatory duty under § 8.25(a)(5) pursuant to its previous finding that "§ 8.25 does not require the Port District to conduct a lien sale for every registered boat impounded for some reason." [See Doc. No. 122, at 8.] As the Court previously found, § 8.25(a)(5) pertains to third parties conducting lien sales to satisfy their interests in impounded vessels, and

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[16]In its surreply, defendant even refuses to concede this much. Instead, defendant asserts Morgan's letter of February 4, 2002 "never identifie[d] [Morgan] as an owner or agent of the vessel." According to defendant, the letter "appear[ed] to be an inquiry from a member of the public[.]" [Surreply, at 5.]

does not limit the Port's discretion to destroy such vessels pursuant to § 8.25(a)(4).[17]

CONCLUSION

Because plaintiffs grounded their claim of negligence in Government Code § 815.6, but cite no statute imposing a "mandatory duty" on the defendant, plaintiffs' negligence claim fails as a matter of law.[18] Therefore, the Court **GRANTS** defendant's motion for summary judgment.

The Court **HAS TERMINATED** all of the claims for relief in Pierce's second amended

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[17]In the event this Court grants defendant's motion, plaintiffs request leave to amend the complaint "to allege facts learned through post-filing developments and evidence obtained during discovery." [Pls. Supp. Brief, at 10.] The Court denies this request because leave to amend is futile. The Court grants defendant's motion not because plaintiffs have pled insufficient facts, but because plaintiffs have provided no legal basis for their negligence action. In considering defendant's motion, the Court notes that it has generously allowed plaintiffs to go beyond the allegations in the complaint(which does not cite a single statute in support of the negligence cause of action). Having given plaintiffs a full opportunity to make their best legal argument, plaintiffs' claim still fails. The Court finds it would be futile to allow plaintiffs to set forth new facts in support of their negligence claim.

[18]"[Q]uestions of statutory immunity do not become relevant until it has been determined thatthe government entity owes a duty of care to the plaintiff and would be liable in the absence of suchimmunity." Walt Rankin & Associates, 84 Cal. App. 4th at 612-13. Because this Court finds that defendant did not owe plaintiffs a mandatory duty, the Court need not reach defendant's argument forstatutory immunity.

complaint and Morgan's third amended complaint. The only claims remaining in this action are defendant's four counterclaims for declaratory relief, injunctive relief, public nuisance, and set-off costs. [See Doc. No. 42 in 03cv172; Doc. No. 43 in 03cv171.] The parties **SHALL APPEAR** before the Court for a status hearing on defendant's counterclaims on Monday, January 22 at 10:30 a.m.

IT IS SO ORDERED.

Dated: December 6, 2006

/s/
IRMA E. GONZALEZ, Chief Judge, United States District Court

APPENDIX F - ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DATED AND FILED MARCH 23, 2007

UNITED STATES DISTRICT COURT

SOUTHER DISTRICT OF CALIFORNIA

KATHLEEN PIERCE and MATTHEW MORGAN Plaintiffs/Counter-defendants v. SAN DIEGO UNIFIED PORT DISTRICT, Defendant/ Counter-claimant.	CASE NO. 03CV172 IEG (AJB), *consolidated with* 03CV171 **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** [Doc. No. 158]

Presently before the Court is the San Diego Unified Port District's ("defendant") motion for summary judgment on its counterclaim for costs and reimbursement arising out of the removal and destruction of plaintiffs' vessels. (Doc. No. 158.) For the reasons stated below, the Court grants defendant's motion.

BACKGROUND

A. Factual Background

In 1984, James Morgan, Sr. completed the construction of a two-story recreational barge, "The Castle." (Morgan Decla. ¶ 3.) Morgan, Sr. rented out the Castle and other smaller vessels. (Id. ¶ 13.) Plaintiff Matthew Morgan ("Morgan") held an ownership interest in the Castle and other smaller vessels. (Doc. No. 72 in 03cv171, at 4-5.) Plaintiff Kathleen Pierce ("Pierce") held a security interest in the Castle and other smaller vessels. (Pls. Exhibits D & E.) Pierce was also listed as the vessels' legal owner on certified copies of Department of Motor Vehicles registration forms. (Pls. Exhibit D.)

On January 22, 2002, defendant impounded the Castle for being in violation of Port District Code provisions. (Doc. No. 122 in 03cv172, at 2.) The Castle had been anchored for over two years in an unseaworthy condition. (Id.) On March 19, 2002, Ellen Faye Gross, deputy port attorney, wrote to Morgan, Sr. that the owner could retrieve the Castle at any time by presenting proof of ownership and paying all impoundment-related fees due on the date of retrieval. [Id. at 2.] Defendant destroyed the Castle and other smaller vessels in the summer of 2002.[19]

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[19] The declaration of James Morgan states defendant destroyed the Castle and other vessels on June 15, 2002. (Morgan Decla. ¶ 25.) However, the Project Order Cost Report that defendant submits in support of its motion states the removal of the Castle took place on

B. Procedural Background

On September 17, 2002, defendant rejected Pierce's accident/damage claim for the allegedly improper impoundment and destruction of the Castle and other smaller vessels. (Memo. ISO Motion, at 3.) On January 27, 2003, Pierce and the Morgans filed separate but similar complaints. (Doc. No. 1 in 03cv172; Doc. No. 1 in 03cv171.) Pierce twice amended her complaint and filed the second amended complaint on November 7, 2003. (Doc. No. 20 in 03cv172.) Defendant filed an amended answer on May 27, 2004 and counterclaimed, inter alia, for the costs defendant incurred in removing and destroying The Castle and other smaller vessels. (Doc. No. 42 in 03cv172, at 16.) The Morgans thrice amended their complaint and filed the third amended complaint on February 24, 2004. (Doc. No. 32 in 03cv171.) Defendant filed an amended answer on May 27, 2004, again counterclaiming for removal and destruction costs. (Doc. No. 43 in 03cv171, at 16.)

On March 13, 2006, Magistrate Judge Battaglia ordered the consolidation of the Pierce and Morgan cases. (Doc. No. 82 in 03cv172.) Through several rounds of dispositive motions, the Court eventually dismissed or granted summary judgment to defendant on all of plaintiffs' causes of

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May 15, 2002. (Def. ExhibitD.) Either date is more than thirty (30) days after Gross wrote the March 19 letter to Morgan, Sr.

action. (See Doc. Nos. 69, 122, & 152 in 03cv172; Doc. No. 72 in 03cv171.[20]) Only deendant's counterclaims remained. (Doc. No. 152 in 03cv172, at 8.)

On January 24, 2007, the Court ordered defendant to move for summary judgment on all counterclaims, if the parties could not settle those counterclaims. (Doc. No. 155.) On February 15, 2007, defendant filed its motion for summary judgment for costs that defendant incurred in removing and destroying plaintiffs' vessels.[21] (Doc. No. 158, at 8.) On March 5, 2007, plaintiffs filed their opposition. (Doc. Nos. 159-160.) On March 12, 2007, defendant filed its reply.4 (Doc. No. 161.)[22]

LEGAL STANDARD

"Under Rule 56(c), summary judgment is proper when the pleadings and discovery, read in

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[20] This Order also dismissed James Morgan for lack of standing, leaving Matthew Morgan as the only remaining plaintiff in the Morgan case. (Doc. No. 72 in 03cv171, at 4.)

[21] Because the Court ordered defendant to move for summary judgment on all of its counterclaims, and yet defendant's motion makes no reference to the counterclaims for declaratory and injunctive relief and public nuisance, the Court finds defendant has waived those counterclaims.

[22] The Court grants defendant's request to take judicial notice of the Court's Orders of February2, 2005; July 7, 2006; and December 6, 2006; and of District Code §§ 8.24-8.25. (See Def. Request for Judicial Notice.)

the light most favorable to the nonmoving party, demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Armstrong v. Burlington N. R.R Co., 139 F.3d 1277, 1278 (9th Cir. 1998) (quoting 20th Century Ins. Co. v. Liberty Mut. Ins. Co., 965 F.2d 747, 750 (9th Cir. 1992)); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is "genuine" when "the evidence presented is such that a jury applying [the appropriate] evidentiary standard could reasonably find for either the plaintiff or the defendant." Anderson, 477 U.S. at 255.

Once the moving party meets the requirement of Rule 56, the burden shifts to the party resisting the motion, who "must set forth specific facts showing that there is a genuine issue for trial." Id. at 256. It is not enough for the party opposing a properly supported motion for summary judgment to "rest on mere allegations or denials of his pleadings." Id. Genuine factual issues must exist that "can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Id. at 250. To make such a showing, the nonmoving party must go beyond the pleadings to designate specific facts showing that there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

DISCUSSION

The Court previously found the Port District seized the Castle pursuant to Port District Code §

4.35, which, at the time of impoundment, stated in part, "Anchoring or mooring in Central San Diego Bay, except in anchorage areas designated in [other provisions] of this Code, is prohibited and unlawful." § 4.35(c)(3).[23] (See Pl. Exhibit K; Doc. No. 122 in 03cv172, at 6.) Furthermore, "the Executive Director or any harbor police officer is hereby authorized to remove and impound any vessel . . . found in violation or any . . . provision of this Code[.]" Code § 8.25(a)(1). Defendant may "destroy" an impounded vessel if defendant cannot locate the vessel's owner or agent within thirty days of impoundment, or if the owner or agent refuses to pay the removal and storage costs upon demand. Id. § 8.25(a)(4). When defendant removes, seizes, and destroys a vessel for violation of Code provisions, "[n]othing herein shall relieve the owner of such vessel . . . or the person responsible for such vessel . . . from independent personal liability for such costs and expenses and any such owner or person responsible shall remain so liable." Id. § 8.25(a)(5).

Applied to these facts, the Court previously found defendant seized and destroyed the Castle and other vessels in compliance with the applicable Code provisions and the requirements of due process. (Doc. No. 122 in 03cv172, at 6, 8.) For the reasons stated in the Court's prior Order, the Court here rejects plaintiffs' allegations that defendant's seizure and destruction of the Castle violated

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[23]Section 4.35 was subsequently amended in 2004. (Pl. Exhibits K & M.) However, the subsection at issue in this case did not substantively change. and destruction.6 Id. § 8.25(a)(5).

plaintiffs' due process rights. (See Opp., at 6-9.) Instead, the Court finds defendant impounded the Castle pursuant to Code § 8.25(a)(1) because the Castle was anchored in Central San Diego Bay in violation of § 4.35. (See Pl. Exhibit I.) Before destroying the Castle, defendant could not locate the owner or agent, nor did any owner or agent pay the costs and expenses of impoundment. Code § 8.25(a)(3)-(4). The Court again finds defendant destroyed the Castle pursuant to Code § 8.25(a)(4). (Doc. No. 122 in 03cv172, at 8.) Because the entire process of impounding and destroying the Castle was pursuant to § 8.25(a), the "owner[s]" and "person[s] responsible" for the Castle have "independent personal liability" for the costs of removal, storage, and destruction. Id. §8.25(a)(5).[24]

The Court finds both plaintiffs are "owners" of the Castle, within the meaning of the Port District Code. Pierce was listed as the Castle's legal owner on the DMV registration form. (Pl. Exhibit E, at 7.) Matthew Morgan previously established his standing to sue by a record of conveyance of interests "establishing [his] ownership interest in

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[24]The Castle's violation of Code § 4.35 is a sufficient basis for holding plaintiffs liable for defendant's costs in removing and destroying the Castle. The Court rejects defendant's alternative argument that plaintiffs "abandoned" their vessels. See Code § 8.24. As the Court previously found, "plaintiff has submitted sufficient evidence to raise a triable issue of fact as to whether the vessels were 'abandoned'" because James Morgan's declaration alleges that he was aboard the Castle when defendant seized it. (See Doc. No. 69 in 03cv172, at 12; Morgan Decla. ¶¶ 21-23.)

the vessels[.]" (Doc. No. 72 in 03cv171, at 4-5.) Therefore, Matthew Morgan also is an owner of the Castle.

Defendant's counterclaim estimated "any and all costs associated with the District's removal and destruction of the 'Castle'" to be $25,162.66. (Counterclaim ¶ 18(e).) Defendant submitted a properly authenticated Project Order Cost Report for this amount. (Def. Exhibit C.)

According to defendant's maintenance supervisor, the submitted report "is a true and accurate copy and representation of the costs incurred by the District for the removal of the Castle." (Behning Decla. ¶ 4.) Plaintiffs, therefore, are independently and personally liable for $25,162.66 under Code § 8.25(a)(5).

Defendant also seeks $20,482.25, which defendant paid to Ocean Blue Environmental Services, Inc. to "remove hazardous waste from derelict vessel." (Def. Exhibit D.) Defendant authenticates the Ocean Blue invoice with the declaration of its finance department director, who
declares the invoice is "for services rendered regarding the removal of hazardous waste from derelict vessels." (Erickson Decla. ¶ 4.)

By submitting the Ocean Blue invoice, defendant seeks more damages than the amount pled in the counterclaim. In cases not involving default judgments, "every final judgment shall grant the relief to which the party in whose favor it

is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." Fed. R. Civ. P. 54(c); see In re Bennett, 298 F.3d 1059, 1069 (9th Cir. 2002) (where party is entitled to relief, court must grant relief, even if party does not formally demand relief in its pleadings). Applied to monetary damages, the amount actually awarded by the Court may exceed the amount of damages that defendant alleged in its prayer for relief. Stineman v. Fontbonne Coll., 664 F.2d 1082, 1088 (8th Cir. 1981); Robertson-Ceco Corp. v. Nat'l Union Fire Ins. Co., 292 F. Supp. 2d 1082, 1085 (N.D. Ill. 2003); Hon. William W. Schwarzer et al., California Practice Guide: Federal Civil Procedure Before Trial § 8:164 (rev. ed. 2006).

Here, neither the invoice nor the authenticating declaration mentions the Castle or other smaller vessels owned by the plaintiffs. The only connection between the Ocean Blue invoice and the vessels at issue in this litigation is a conclusory citation to the invoice in defendant's moving papers. (Memo. ISO Motion, at 7.) Defendant has submitted no evidence to support holding plaintiffs liable under Code § 8.25(a)(5) for these unspecified "hazardous waste removal" costs. Although defendant is not limited to the amount of damages sought in its prayer for relief, the Court finds, as a matter of law, defendant is not entitled to recover the Ocean Blue invoice costs from plaintiffs. See Kassbaum v. Steppenwolf Productions, Inc., 236 F.3d 487, 494 (9th Cir. 2000) (where one party has filed for summary judgment, court may sua sponte grant summary judgment to

a non-moving party). Defendant shall only recover the amount of damages pled in its prayer for relief because defendant is legally entitled only to that amount.

CONCLUSION

For the reasons stated herein, the Court hereby **GRANTS** defendant's motion for summary judgment on its counterclaim for costs and reimbursement. Each plaintiff **IS JOINTLY AND SEVERALLY LIABLE** to defendant for $25,162.66. The Court **RETAINS JURISDICTION** to enforce this judgment against plaintiffs. This Order hereby **CONCLUDES** the litigation in this case.

IT IS SO ORDERED.

Dated: March 23, 2007

/s/
IRMA E. GONZALEZ, Chief Judge, United States District Court

APPENDIX G - JUDGMENT IN A CIVIL CASE DATED AND FILED MARCH 23, 2007

United States District Court

Southern District of California

Kathleen Pierce;
Matthew Morgan

JUDGMENT IN A CIVIL CASE

V.

San Diego Unified Port District

CASE NUMBER: 03cv-172-IEG(AJB)

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the Court **GRANTS** defendant's motion for summary judgment on counterclaim for costs and reimbursement. Each plaintiff is **JOINTLY AND SEVERALLY LIABLE** to defendant $25,162.66. The Court retains jurisdiction to enforce this judgment against plaintiffs. Litigation in this case is concluded...

Dated: March 23, 2007

W. Samuel Hamrick, Jr.
Clerk

J. Haslam /S/
(By) Deputy Clerk

ENTERED ON March 23, 2007

APPENDIX H - STATUTES AND ORDINANCES INVOLVED

SAN DIEGO UNIFIED PORT DISTRICT CODE SECTION 4.35 - CENTRAL SAN DIEGO BAY ANCHORING, MOORING AND AQUATIC ACTIVITIES REGULATED (as it existed in 2002)

(a) Purpose

California law (San Diego Unified Port District, Harbors and Navigation Code, Appendix I, Sections 55 and 56) requires the Board of Port Commissioners to regulate and control the anchoring, mooring, towing, and docking of vessels, and to make and enforce all necessary rules and regulations governing the use and control of navigable waters within the District. The purpose of this section of the San Diego Unified Port District Code is to implement that responsibility within Central San Diego Bay.

Duly published regulations and restrictions promulgated by competent State or Federal authority shall be paramount in the event of conflict with provisions of this Code.

(b) Definitions

1. Central San Diego Bay - That part of San Diego Bay lying northerly of South San Diego Bay, as defined in this Code, and southerly of a line drawn westerly from the South Embarcadero Marina Park fishing pier to the easterlymost point of North Island

Naval Station in Latitute 32 42" 10" N.

The majority of Central San Diego Bay has been deepened by dredging to a depth of Ten (10) Feet or more at low tide.

2. Glorietta Bay - That portion of Central San Diego Bay lying westward of Longitude 117 10' W.

3. Glorietta Bay Channel - That channel connecting the northwesterly extreme of Glorietta Bay with the Main Ship Channel at Coronado Bridge Pilling No. 15.

4. Bay Bridge Roadstead - That part of Central San Diego Bay bounded on the south by a line parallel to the 250 Feet north of the Coronado Bridge, on the northeast by the Main Ship Channel, on the west by the shoreline of Coronado, and on the north by Latitude 32 41' 30" N.

(c) Regulations

1. Central San Diego Bay Anchorage Established - There is hereby established in the southern part of Central San Diego Bay an Anchorage for the accommodation of mariners. This Anchorage is approximately Eighty Two (82) acres in area and lies westerly of the Main Ship Channel and northerly of the westerly projection of the Sweetwater Channel; more particularly described as follows:

A rectangle of open Bay bounded on the north and south by parallels of Latitute 32 39' 12" N and 32

38' 45" N, respectively, and on the east and west by meridians of Longitude 117 07' 27" W and 117 07' 42" W, respectively,

This Anchorage, administered by the San Diego Unified Port District, is marked by buoys around its perimeter. Vessels achoring within this Anchorage area are required to comply with all applicable inland rules of the road, including anchor lights and shapes.

2. Bay Bridge Roadstead Moorage Established

The Bay Bridge Roadstead Moorage area is hereby established for the accommodation of mariners desiring to moor to buoys in Central San Diego Bay. This Moorage is described in Sec. 4.35(b)4, above.

This Moorage is administered by the San Diego Unified Port District and anchoring or mooring therein without permission of the District is prohibited. Mariners anchoring in this area are required to comply with all applicable inland rules of the road, including anchor lights and shapes and with any Section of this Code dealing with administration of this anchorage.

3. Central San Diego Bay, Anchoring Prohibited.

Central San Diego Bay, south of the Glorietta Bay Channel, with the exception of military security and restricted areas, marked channels and designated anchorages, is reserved for aquatic sports activities and regattas.

Anchoring or mooring in Central San Diego Bay, except in Special Federal Anchorage A-5 and in anchorage areas designated in Section 435(c)1 and 4.35(c)2 of this Code, is prohibited and unlawful.

4. Authorization to anchor in Central San Diego Bay outside designated anchorage areas for limited periods of not more than Seventy Two (72) Hours may be obtained by application to the Office of the Chief of San Diego Harbor Police.

5. It shall be unlawful for any vessel under way in Glorietta Bay, and Bay Bridge Mooring Area, as defined in this Code, to be operated at a speed in excess of Five (5) Miles Per Hour.

6. It shall be unlawful to anchor, moor, make fast to the bottom, strand, or ground any vessel or structure or to be in control or possession of or to operate any vessel or structure which is anchored, moored, made fast to the bottom, stranded or grounded within Central San Diego Bay, except anchoring and mooring as permitted in Special Federal Anchorage A-5, and in anchorage areas designated in Sec. 4.35(c)1 and 4.35(c)2 of this Code.

(d) Injunctive Relief

1. The San Diego Unified Port District may seek relief from the appropriate court to restrain or enjoin any violation of this Section.

(Enacted February 10, 1987 - Ordinance 1201)

(Amended June 18, 1991 - Ordinance 1436)

SAN DIEGO UNIFIED PORT DISTRICT CODE SEC. 8.25 . AUTHORITY TO REMOVE WATERCRAFT

(a) Authority to Remove Watercraft Found in Violation of Law

1. In addition to any other authority or remedy provided by any statute, the Executive Director or any harbor police officer is hereby authorized to remove and impound any vessel, watercraft or object found in violation of any Federal or State law or provision of this Code in accordance with the procedures set forth in this Section. An attendant on board shall be given the opportunity to forthwith remove any such vessel, watercraft or object before it is impounded.

2. The Executive Director is authorized to enter into contracts, on behalf of the District, with private parties for the removal and impounding of any vessel, watercraft or object found in violation of any Federal or State law or provision of this Code.

3. The registered and legal owners of record, or the agent of any such vessel, watercraft or object so removed and impounded shall have the right to secure the release of such vessel, watercraft or object after furnishing proof of such ownership to the District and after payment to the District of the costs and expenses for such removal, impound and storage.

4. If the owner or agent of any such vessel, watercraft or object cannot be found within Thirty (30) days, or, refuses upon demand to pay the lawful costs and expenses as provided above, the District may sell the property at public auction after publication of the sale is advertised in a newspaper of general circulation at least Five (5) days prior thereto, or, the District may keep, destroy or otherwise dispose of such property.

5. Harbors and Navigation Code Section 500 et seq. shall apply to the disposition of vessels registered with the Department of Motor Vehicles. Nothing herein shall relieve the owner of such vessel, watercraft or object or the person responsible for such vessel, watercraft or object from independent personal liability for such costs and expenses and any such owner or person responsible shall remain so liable.

(b) Authority to Remove Watercraft Pursuant to Judgment

1. In addition to any other remedies provided by law, the Executive Director or any harbor police officer is hereby authorized to remove and impound any vessel, watercraft or object which a court of competent jurisdiction determines to be in violation of any law.

2. The Executive Director is authorized to enter into contracts on behalf of the District with private parties for the removal and impounding of any vessel, watercraft or object which a court of competent jurisdiction determines to be in violation of any law.

3. The registered and legal owners of record, or the agent of any such vessel, watercraft or object so removed and impounded shall have the right to secure the release of such vessel, watercraft or object after furnishing proof of such ownership to the District and after payment to the District of the costs and expenses for such removal, impound and storage.

4. If the owner or agent of any such vessel, watercraft or object cannot be found within Thirty *(30)* days, or, refuses upon demand to pay the lawful costs and expenses as provided above, the District may sell the property at public auction after publication of the sale is advertised in a newspaper of general circulation at least Five (5) days prior thereto, or, the District may keep, destroy or otherwise dispose of such property.

5. Harbors and Navigation Code Section *500* et seq. shall apply to the disposition of vessels registered with the Department of Motor Vehicles. Nothing herein shall relieve the owner of such vessel, watercraft or object or the person responsible for such vessel, watercraft or object from independent personal liability for such costs and expenses and any such owner or person responsible shall remain so liable.

(Enacted January *20,* 1987 . Ordinance 1198)
(Amended May 26, 1992 - Ordinance 1498)
(Amended September 4, *2001* • Ordinance 2148 - Urgency Ordinance for Sections 8.25 [a] 1 and 2)

California Harbors and Navigation Code
Division 3. Vessels
Chapter 2. Civil Actions and Liens
Article 4. Boaters Lien Law
Section§ 504. Lienholders on vessels valued at under $1,500; lien sale; proceedings

(a) For vessels with a value determined to be one thousand five hundred dollars ($1,500) or less, the department shall promptly furnish the lienholder with the names and addresses of the registered and legal owners of record.

(b) The lienholder shall, immediately upon receipt of the names and addresses, send by mail, with return receipt requested, a completed notice of pending lien sale form, a blank declaration of opposition form, and a return envelope preaddressed to the department, to the registered owner and legal owner at their addresses of record with the department, to any other person known to have a proprietary interest in the vessel, and to the department.

(c) Upon receipt of the notice, the department shall mark its records and thereafter notify any person having a proprietary interest in the vessel that there is a pending lien sale and that title will not be transferred until the lien is satisfied or released.

(d) All notices shall be signed under penalty of perjury and shall include all of the following information and statements:

(1) A description of the vessel, including make, identification number, and state of registration, to the extent available.

(2) The specific date, exact time, and place of sale, which shall be set not less than 35 days, but not more than 60 days, from the date of mailing.

(3) The names and addresses of the registered and legal owners of the vessel and any other person known to have an interest in the vessel.

(4) All of the following statements:

(A) The amount of the lien and the facts that give rise to the lien. The statement shall include, as a separate item, an estimate of any additional storage costs accruing pending the lien sale.

(B) The person has a right to a hearing in court.

(C) If a court hearing is desired, a declaration of opposition signed under penalty of perjury is required to be signed and returned to the department within 15 days of the date the notice of pending lien sale was mailed.

(D) If the declaration of opposition is signed and returned, the lienholder will be allowed to sell the vessel only if he or she obtains a court judgment or if he or she obtains a subsequent release from the declarant.

(E) If a court action is filed, the declarant will be served by mail with legal process in the court proceedings at the address shown on the declaration of opposition and may appear to contest the claim.

(F) The person may be liable for court costs if a judgment is entered in favor of the lienholder.

(e) If the department receives the completed declaration of opposition within the time provided, the department shall notify the lienholder within 16 days that a lien sale shall not be conducted unless the lienholder files an action in court within 20 days of the notice and judgment is subsequently entered in favor of the lienholder or the declarant subsequently releases his or her interest in the vessel.

(f) Service on the declarant by mail with return receipt requested, signed by the declarant or an authorized agent of the declarant at the address shown on the declaration of opposition, shall be effective. Return of a declaration of opposition shall constitute consent by the declarant to service of legal process for the desired court hearing upon him or her in the foregoing manner. If the lienholder has attempted service upon the declarant by that method at the address shown on the declaration of opposition and the mail has been returned unclaimed, the lienholder may proceed with the sale.

California Harbors and Navigation Code
Division 3. Vessels
Chapter 3. Wrecks and Salvage
Article 1. Wrecks and Wrecked Property
Section§ 522. Abandoned hulks within municipal limits; disposition; claim of ownership; fee

(a) Any hulk, derelict, wreck, or parts of any ship, vessel, or other watercraft sunk, beached, or allowed to remain in an unseaworthy or dilapidated condition upon publicly owned submerged lands, salt marsh, or tidelands within the corporate limits of any municipal corporation or other public corporation or entity having jurisdiction or control over those lands, without its consent expressed by resolution of its legislative body, for a period longer than 30 days without a watchman or other person being maintained upon or near and in charge of the property, is abandoned property.

Thereafter, that municipal corporation or other public corporation or entity may, notwithstanding any other provision of law, take title to the abandoned property for purposes of abatement without satisfying any property tax lien on that property, and also may cause the property to be sold, destroyed, or otherwise disposed of in any manner it determines is expedient or convenient. Any property tax lien on the abandoned property shall be satisfied within 30 days following the sale of the abandoned property by a municipal corporation or public entity. Any sale in accordance with this section shall vest complete title in the purchaser who shall forthwith take steps to remove the

property. Any proceeds derived from the sale shall be transmitted to the Treasurer for deposit in the General Fund.

(b) However, if the owner of the property securely affixes to the property a notice in plain view setting forth the owner's name and address and claim of ownership, together with the name and address of an agent or representative whom the owner may designate to act within the State of California if the owner does not reside in the state, and files a copy of the notice with the secretary of the municipal corporation or other public corporation or entity having jurisdiction or control over the lands at least 10 days prior to the removal, the municipal corporation or other public corporation or entity may not sell, destroy, or otherwise dispose of the property until the corporation or entity has first given the owner or the owner's agent, at the address specified in the claim of ownership, 15 days' notice to remove or cause the property to be removed, and then only if the property is not removed by the owner or the owner's agent within that time or reasonable extensions of time as the corporation or entity may grant by resolution. If a registration number appears on the watercraft, the municipal corporation or other public corporation or entity shall send the notice to the last registered owner and the disposition shall be handled as a lien sale under Section 504.

(c) Any municipal corporation or other public corporation may charge a fee to any person who is determined by that municipal or other public corporation to have caused property of a type described

in subdivision (a) to become abandoned as described in that subdivision within its corporate limits, in an amount not to exceed the amount of that municipal or other public corporation's actual and reasonable costs incurred pursuant to this section with respect to the abandoned property.

California Harbors and Navigation Code
Division 3. Vessels
Chapter 3. Wrecks and Salvage
Article 1. Wrecks and Wrecked Property
Section§ 526. Disposal of wrecked property, abandoned property, or property removed from a navigable waterway; notice of removal; hearing

(a) Notwithstanding any other provision of law, any wrecked property that is an unseaworthy derelict or hulk, or abandoned property as described in Section 522, or property removed from a navigable waterway pursuant to Section 523 or 524 that is an unseaworthy derelict or hulk, may be sold or otherwise disposed of by the public agency that removed or caused the removal of the property pursuant to this section, subject to the following conditions:

(1) The property has been appraised by disinterested persons, and has an estimated value of less than two thousand dollars ($2,000).

(2) There is no discernable registration, license, hull identification number, or other identifying insignia on the property, or the Department of Motor Vehicles is unable to produce any record of the registered or legal

owners or lienholders.

(3) Not less than 72 hours before the property was removed, the peace officer or authorized public employee securely attached to the property a distinctive notice stating that the property would be removed by the public agency.

(4) Within 48 hours after the removal, excluding weekends and holidays, the public agency that removed or caused the removal of the property sent notice of the removal to the registered and legal owners, if known or discovered subsequent to the removal, at their addresses of record with the Department of Motor Vehicles, and to any other person known to have an interest in the property. A notice sent by the public agency shall be sent by certified or first-class mail.

(5) If the public agency is unable to locate the registered and legal owners of the property or persons known to have an interest in the property as provided in paragraph (4), the public agency published, or caused to be published, the notice of removal for at least two weeks in succession in one or more daily newspapers circulated in the county.

(b) The notice of removal required by paragraphs (3) to (5), inclusive, of subdivision (a) shall state all of the following:

(1) The name, address, and telephone number of the public agency providing the notice.

(2) A description of the property removed.

(3) The location from which the property is to be or was removed.

(4) The location of the intended or actual place of storage.

(5) The authority and purpose for removal of the property.

(6) A statement that the property may be claimed and recovered within 15 days of the date the notice of removal was issued pursuant to paragraph (4) or (5) of subdivision (a), whichever is later, after payment of any costs incurred by the public agency related to salvage and storage of the property, and that following the expiration of the 15-day period, the property will be sold or otherwise disposed of by the public agency.

(7) A statement that the registered or legal owners or any other person known to have an interest in the property have the opportunity for a poststorage hearing before the public agency that removed, or caused the removal of, the property to determine the validity of the removal and storage if a request for a hearing is made in person or in writing to that public agency within 10 days from the date of notice; that if the registered or legal owners or any other person known to have an interest in the property disagree with the decision of the public agency, the decision may be reviewed pursuant to Section 11523 of the Government Code; and that during the time of the initial hearing, or during the time the decision is being

reviewed pursuant to Section 11523 of the Government Code, the vessel in question shall not be sold or otherwise disposed of.

(c)(1) Any requested hearing shall be conducted within 48 hours of the time the request for a hearing is received by the public agency, excluding weekends and holidays. The public agency that removed the vehicle may authorize its own officers or employees to conduct the hearing but the hearing officer shall not be the same person who directed the removal and storage of the property.

(2) The failure of either the registered or legal owners or any other person known to have an interest in the property to request or attend a scheduled hearing shall not affect the validity of the hearing.

(d) The property may be claimed and recovered by its registered and legal owners, or by any other person known to have an interest in the property, within 15 days of the date the notice of removal was issued pursuant to paragraph (4) or (5) of subdivision (a), whichever is later, after payment of any costs incurred by the public agency related to salvage and storage of the property.

(e) The property may be sold or otherwise disposed of by the public agency not less than 15 days from the date the notice of removal was issued pursuant to paragraph (4) or (5) of subdivision (a), whichever is later, or the date of actual removal, whichever is later.

(f) The proceeds from the sale of the property, after deducting expenses for salvage, storage, sales costs, and any property tax liens, shall be deposited in the Abandoned Watercraft Abatement Fund for grants to local agencies, as specified in paragraph (1) of subdivision (d) of Section 525.

(g) It is the intent of the Legislature that this section shall not be construed to authorize the lien sale or destruction of any seaworthy vessel that is currently registered and operated in accordance with local, state, and federal law.

(2)

No. 09-90

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States

KATHLEEN PIERCE, et al.,
Petitioners,

v.

SAN DIEGO UNIFIED PORT DISTRICT,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

DUANE E. BENNETT
PORT ATTORNEY
SAN DIEGO UNIFIED PORT DISTRICT
WILLIAM D. MCMINN
DEPUTY PORT ATTORNEY
Counsel of Record
ELLEN GROSS MILES
DEPUTY PORT ATTORNEY
3165 PACIFIC HIGHWAY
SAN DIEGO, CA 92101
(619) 686-6219

August 20, 2009

Counsel for Respondent

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

The United States Court of Appeals for the Ninth Circuit affirmed the District Court's orders granting Respondent San Diego Unified Port District's motion for summary judgment against Petitioners Kathleen Pierce and Matthew Morgan. In doing so, the Ninth Circuit properly ruled that Respondent: 1) did have authority to seize the vessel which was in violation of Respondent's anchoring laws, 2) did not violate Petitioners' due process rights, and 3) is not liable under the standards set forth for a violation of 42 U.S.C. Section 1983 established in *Monell v. Dept. of Social Servs.*, 436 U.S. 658 (1978).

One Question is presented:

1. Did the Ninth Circuit use erroneous factual findings in reaching its ruling and therefore its interpretation of the law departed from and is contrary to the standard for the Respondent to be liable for a violation of 42 U.S.C. Section 1983, established in *Monell v. Dept. of Social Servs.*, 436 U.S. 658 (1978)?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding below are identified in the caption of the case.

The San Diego Unified Port District is a public entity organized and existing under the provisions of the San Diego Unified Port District Act.

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RULES

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I.

INTRODUCTION

Petitioners have presented no "compelling reasons" for their Petition for a Writ of Certiorari to be granted (Petition). *See*, Sup. Ct. R. 10. Specifically, Petitioners fail to demonstrate that, the United States Court of Appeals for the Ninth Circuit, April 22, 2009, Opinion is in conflict with a decision of another United States court of appeals on the same important matter; or has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. Petitioners fail to demonstrate that the Ninth Circuit decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decision of this Court. *See* Sup. Ct. R. 10(a)-(c). In fact, Petitioners make only half-hearted attempts to demonstrate that both the district court and the Ninth Circuit misinterpreted and misapplied the statutory law by failing to consider factual issues and by relying on erroneous factual issues. Petitioners' allegations are incorrect and, in any event, constitute insufficient grounds to grant the Petition. *See* id. Therefore, the Petition should be denied.

At the outset, Petitioners contend that the district court and the Ninth Circuit, erroneously found that Respondent was not required to seek an injunction in order to enforce a violation of Respondent's code section 4.35 because code section 8.25 was in existence

at the time of the seizure of the vessel, and 8.25 did not require Respondent to seek an injunction. Petitioners contend that, until 2004, Respondent's only means of enforcing its applicable code sections was through an injunction, and that since the vessel was seized in 2002 an injunction was Respondent's only remedy.

Petitioners' allegation is a misstatement of fact and law. On September 4, 2001, Respondent adopted Ordinance 2148 which amended code section 8.25 to reflect that the Executive Director or any harbor police officer is authorized to remove and impound any vessel, watercraft or object found in violation of Federal or State law or provision of Respondent's code. The Ordinance went into effect before the events giving rise to this lawsuit, not in 2004, as Petitioners contend. As a result, the district court and Ninth Circuit properly found, Respondent's code section 8.25 provides for the impoundment of any vessel, watercraft or object found in violation of any Federal or State law or provision of Respondent's code, and therefore the injunction was not Respondent's only remedy.

Petitioners also claim that Respondent failed to comply with procedural requirements under the California Harbors and Navigation Code, prior to disposition of the vessel and that, as a result, violations of Petitioners' due process rights have gone unchecked by both the district court and the Ninth Circuit.

Petitioners' allegation is a misstatement of fact and law. Petitioners contend that, the vessel was registered with the DMV and, therefore, Harbors and Navigation Code section 500 et seq. dictated the notice

and disposition procedures that the Respondent had to follow regarding the vessel. Petitioners allege that Respondent violated these code provisions by destroying the vessel without conducting a mandatory lien sale.

However, in this case, in addition to Petitioners having actual and constructive notice of the seizure and pending destruction of the vessel if the owner did not take possession of it, the district court and Ninth Circuit properly found, Petitioners could not show a failure to follow state or local ordinances because the provisions of the Harbors and Navigation code they point to do not bind Respondent. Harbors and Navigation Code section 500 et seq. is commonly known as the "Boaters Lien Law" and provides procedures for parties holding possessory liens against boats to recover their interest by forcing a lien sale. (*See*, Harbors and Navigation Code section 500 et seq.) Sections 522 and 526 of the Harbors and Navigation Code give public entities authority to dispose of abandoned vessels in accordance with the procedures provided therein. However, nothing in Sections 522 or 526, or elsewhere in the Harbors and Navigation Code section 500 et seq., purports to limit a public entity's authority to dispose of boats taken into custody for other reasons, such as is the case here, where Petitioners' vessel was in violation of Respondent's anchoring laws.

Respondent's code section 8.25(4) addresses the Respondent's authority to dispose of vessels if, as here, the owner or agent of any such vessel, watercraft or object cannot be found within Thirty (30) days, or as here, the owner or agent has actual knowledge of the seizure and storage of the vessel and refuses to pay the

lawful costs and expenses associated with the vessel's storage, and as in this case, instead of retrieving the vessel, merely abandons it.

Respondent complied with its procedures as mandated in Respondent's code section 8.25. Thus, the district court and the Ninth Circuit properly found that the Respondent had authority to dispose of the vessel, pursuant to Respondent's code section 8.25.

Finally, Petitioners' contention that review by this Court is warranted because the district court and Ninth Circuit relied on an erroneous factual determination is far-fetched.

Petitioners allege that former Port Director Don Nay, (deceased) authorized Petitioners' vessel to rest in the location from which it was seized. The district court and Ninth Circuit properly found that, despite Petitioners' contention, there is no evidence to create a genuine issue of material fact as to whether Mr. Nay had the authority or the authorization to allow the Vessel to be exempted from Respondent's code. Petitioners only point to Mr. Nay's authority to enter into contracts for the removal of vessels found in violation of Respondent's code and do not have any evidence to support their contention that, an oral agreement was made with the then-Executive Director to not follow the Respondent's code, which regulates vessel storage.

Simply put, Petitioners have failed completely to carry their burden of demonstrating that there are any compelling reasons for this Court to grant the Petition. Accordingly, the Petition should be denied.

II.

STATEMENT OF THE CASE

It is undisputed that on January 22, 2002, Respondent impounded Petitioners' vessel for being in violation of Respondent, San Diego Unified Port District Code provisions. The vessel had been anchored for over two years in an un-seaworthy condition, and did not have a permit to anchor in the San Diego Bay. Respondent's Harbor Police obtained certificate numbers and registration information related to the vessel in an attempt to determine the legal and registered owners, in order send notice of the vessel's seizure and offer an opportunity for post storage hearing. Respondent sent notice of the vessel seizure, and a request form that can be used by owners to request a post storage hearing, to the legal and registered owners of the property by certified mail.

All notices were returned to Respondent because, as Petitioners admit, Petitioners did not follow the appropriate vehicle code provisions specifically enumerated in Vehicle Code section 9865, which requires that any holder of a certificate of number shall notify the department within 15 days, if his address no longer conforms to the address appearing on the certificate and shall, as part of such notification, furnish the department with his new address.

In addition, Petitioners did not follow Respondent's code section 4.36, which requires that a vessel owner who designates a watchman to provide that information to Respondent. However, James Morgan, (dismissed from the case because he lacked standing as an owner) admitted to being the watchman for the

vessel. Petitioner Matthew Morgan admits that James Morgan was entrusted with the safekeeping of his vessel, and that Petitioner Matthew Morgan received notice of the seizure from his grandfather, watchman James Morgan. Petitioner, Kathleen Pierce admits that she entrusted the safekeeping of her vessel to watchman James Morgan. Watchman James Morgan's claim submitted to the District on August 5, 2002, admits to being the watchman 24 hours a day since 1999 and admits to notice of the seizure of the vessels.

Moreover, the seizure was shown on three local television news networks in the area, specifically, Channel 10 KGTV news, Channel 6 XETV news, and Channel 8 KFMB news, wherein watchman James Morgan is shown acknowledging the vessel seizure while being interviewed on the television news videotapes as the vessels were actually being seized. The videotapes also show Respondent's Harbor Police officer calling for the owner to come forward or the vessel may be destroyed. Also, the Union Tribune, the San Diego newspaper of general circulation, reported in two news articles about the seizure and possible destruction of the vessel and noticed the owner to come forward or the vessel may be destroyed.

Further, on February 4, 2002, watchman James Morgan sent a letter to Respondent inquiring as to the impound fees of the seized vessel, further indicating actual notice of the seizure of the vessel.

On February 21, 2002, Respondent's Deputy Port Attorney responded to the watchman's inquiry of February 4, 2002 and again on March 19, 2002, wrote a follow up letter to watchman James Morgan stating

that, the owner could retrieve the vessel at any time by presenting proof of ownership and paying all impoundment-related fees due on the date of retrieval and informed watchman James Morgan that, should no one claim the vessel and pay all fees by April 1, 2002, it will be destroyed.

However, for some reason unknown to Respondent, Petitioners' watchman never alerted Petitioners about the seizure of the vessel and correspondence between Respondent and watchman James Morgan.

The April 1, 2002, destruction date arrived, and Respondent waited an additional two months for the Petitioners or their watchman to claim the vessel, and thereafter, pursuant to Respondent's code section 8.25, Respondent properly disposed of the vessel on June 15, 2002, only after notice was given and no one attempted to retrieve the vessel.

Thereafter, watchman James Morgan and Petitioners quickly filed claims with Respondent. Watchman James Morgan filed a claim on June 28, 2002 and re-filed on August 5, 2002.

Petitioner Matthew Morgan filed a claim with Respondent on June 24, 2002. Respondent denied Petitioners' claims and thereafter Petitioners filed separate complaints in the district court against Respondent alleging 4th and 14th amendment due process violations, pursuant to 42 U.S.C. 1983.

III.

ARGUMENT

CERTIORARI IS NOT WARRANTED BECAUSE THE LOWER COURTS DID NOT USE ERRONEOUS FACTUAL FINDINGS IN REACHING A RULING AND THEIR INTERPRETATION OF THE LAW IS NOT A DEPARTURE FROM AND IS NOT CONTRARY TO THE STANDARD IN ORDER FOR THE RESPONDENT TO BE HELD LIABLE FOR A VIOLATION OF 42 U.S.C. SECTION 1983 ESTABLISHED IN *MONELL* AND ITS PROGENY.

In order for the Respondent to be held liable for a violation of 42 U.S.C. section 1983, a plaintiff must show that the due process violation resulted from an official policy or custom. *Monell v. Dept. of Social Servs.*, 436 U.S. 658, 661 (1978). There are five ways a plaintiff may establish the existence of a policy or custom sufficient to impose section 1983 liability on a public entity such as the Respondent: 1) actions of municipal legislative bodies; 2) agencies exercising delegated authority; 3) individuals with final decision-making authority; 4) a policy of inadequate training or supervision; and 5) custom. Id.

As the district court recognized, it appears that Petitioners attempt to show that the due process violation occurred due to the act of an individual with final decision-making authority. Petitioners allege that the seizure and destruction was carried out through the official policy of the Respondent.

Additionally, because Petitioners allege that they did not have proper notice to appeal or contest the Respondent's decision to remove the vessel, they argue that the decision to seize and destroy the vessel was a final decision that was not subject to review.

To establish liability under 42 U.S.C. section 1983 as alleged by Petitioners, the Petitioners must establish that the Respondent maintained a pervasive and persistent policy or custom of fostering and tolerating police misconduct that caused the alleged constitutional violations of the Harbor Police. *Monell* at 690-95; *Carter v. District of Columbia,* 795 F.2d 116, 125 (D.C. Cir. 1986). Petitioners cannot recover against the Respondent on a section 1983 cause of action merely because it employed the police officers that allegedly violated Petitioners' constitutional rights. Id.

Moreover, a single incident involving only one or even a few police officers or scattered, non-systemic misconduct is not sufficient to establish fault on the part of the Respondent. See, *City of Oklahoma City v. Tuttle,* 471 U.S. 808, 824 (1985). Instead, Petitioners must prove that the Respondent, through its official policymakers, maintained a policy or custom that caused the violation of the Petitioners' constitutional rights. *Monell*; *Carter*. In *Monell*, *supra*, the court stated that, "a local government may not be sued under section 1983 for an injury inflicted by its employees or agents." *Monell*, at 694. It is now firmly established that such a plan or policy may not be proved through reference to a single unconstitutional activity unless "proof of the incident includes proof that it was caused by an existing, unconstitutional (municipal) policy." *Tuttle*, at 824.

In addition, Petitioners must not only allege and later prove facts sufficient to substantiate a pattern or practice, but Petitioners must also demonstrate that it was the moving force or cause of the constitutional violations the Petitioners allege. *Monell*, 436 U.S. at 694. Liability requires an action taken pursuant to a wrongful policy. "When an official's discretionary decisions are constrained by a policy not of that official's making, the policy, rather than the subordinate's departure from them, is the act of the municipality." *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988). Thus, an employee who has the discretion to act pursuant to an otherwise valid policy and who exercises that discretion in an unconstitutional manner, will not create *Monell* liability because the exercise of discretion, not the municipal policy, caused the constitutional violation. *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986).

Here, Petitioners allege that the Respondent violated its ordinances and as a result violated Petitioners' due process rights.

However, Petitioners have not alleged facts sufficient to substantiate a pattern or practice by the Respondent, and Petitioners have not demonstrated that it was the moving force or cause of the constitutional violation that Petitioners allege. Liability requires an action taken pursuant to a wrongful policy. Since the Harbor Police's discretionary decisions as they relate to the seizure of vessels are constrained by Respondent's policy not of their making, the policy, rather than the subordinate's departure from them, is the act of the municipality. Petitioners have not shown that the Respondent, through its official policymakers, maintained a policy

or custom that caused the violation of the Petitioners' constitutional rights. Consequently, the district court and Ninth Circuit properly found that Petitioners' 42 U.S.C. section 1983 allegation must fail, as Petitioners have not shown that the due process violation allegations resulted from an official Respondent policy or custom.

A. Respondent Had Authority Pursuant to District Code Section 8.25 to Seize the Vessel Without Seeking an Injunction.

On September 4, 2001, the Respondent amended Respondent's code section 8.25 to authorize the Executive Director or Harbor Police to remove and impound any vessel, watercraft or object found in violation of any Federal or State law or provision of the Respondent's code, which includes code section 4.35.

Specifically, the Ordinance states:

> WHEREAS, *in order to preserve the public peace, health and safety of San Diego Bay, the District desires to amend said Section 8.25, Subsections (a)1 and (a)2, to reflect that the Executive Director or any harbor police officer is authorized to remove and impound any vessel, watercraft or object found in violation of any Federal or State law or provision of the District Code, and further to reflect that the Executive Director is authorized to enter into contracts, on behalf of the District, with private parties for the removal and impounding of any vessel, watercraft or object found in violation of any*

Federal or State law or provision of the District Code. [Emphasis added.] (Id.)

As a result, the district court and Ninth Circuit properly found that the Respondent did have authority, other than pursuing an injunction, to enforce its regulations of vessels (including Respondent's code sections 4.35 and 4.36) within the Respondent's jurisdiction at the time Petitioners' vessel was noticed, seized and later destroyed.

B. Petitioners' Due Process Rights Were Not Violated, as Respondent Provided Proper Notice of the Seizure and Destruction of the Vessel and Provided an Opportunity for a Post Storage Hearing and Opportunity to Retrieve the Vessel Upon Paying Appropriate Seizure and Storage Fees.

Respondent did provide notice and post-storage hearing opportunities to the registered and legal owners of the vessel.

The Respondent protected Petitioners' constitutional due process rights by sending notice of the vessel seizure with an opportunity for a post storage hearing to the legal and registered owners of the property by certified mail as required by Respondent's code section 8.25(a)(5), all of which were returned to Respondent, because, as Petitioners have admitted, Petitioners did not follow appropriate vehicle code provisions specifically enumerated in Vehicle Code section 9865, applicable to the registration of Petitioners' vessel states in pertinent part:

> Any holder of a certificate of number shall notify the department within 15 days, if his address no longer conforms to the address appearing on certificate and shall, as part of such notification, furnish the department with his new address.

It is undisputed that Petitioners did not follow the vehicle code and therefore the due process notices sent by the District to the registered and legal owners of the vessel alerting the owners to the Respondent's actions and offering the owners post storage hearings were never received. Had Petitioners followed the required vehicle code provisions, Petitioners would have received the notices that were sent to the registered and legal owners of the vessel alerting them to the seizure and post storage hearing opportunities.

1. Petitioners Had Actual and Constructive Notice of the Seizure and Pending Destruction of the Vessel.

The seizure was shown on three local television news networks in the area, which have been transcribed and certified. Specifically, Channel 10 KGTV news, Channel 6 XETV news, and Channel 8 KFMB news, showed the seizure of the vessel, and recorded watchman James Morgan acknowledging the vessel seizure while being interviewed on the television news videotapes as the vessel was actually being seized. The videotapes also show Respondent's Harbor Police officer calling for the owner to come forward or the vessel may be destroyed. Also, the Union Tribune, the San Diego newspaper of general circulation, reported in two news articles about the seizure and possible destruction of the vessel and

noticed the owner to come forward or the vessel may be destroyed.

2. Respondent's Conduct During the Post-Seizure Period Cannot Support a Due Process Claim as Respondent Was Not Required to Conduct a Lien Sale.

Petitioners contend that the vessel was registered with the DMV and, therefore, California Harbor and Navigation Code section 500 et seq. dictated the notice and disposition procedures that the Respondent had to follow regarding the vessel. In Petitioners' view, the Respondent failed to follow several significant procedures mandated by Harbors and Navigation (H&N) Code.

H&N code section 522, entitled "Abandoned hulks within municipal limits, disposition, claim of ownership, fee" allows the Respondent to destroy a vessel when it is "abandoned." H&N code section 522(a). But, where a "registration number appears on the watercraft, the municipal corporation or other public corporation . . . shall send the notice to the last registered owner and the disposition shall be handled as a lien sale under H&N code section 504." Petitioners allege that the Respondent violated these code provisions by destroying the vessel without conducting a lien sale.

Furthermore, H&N code section 526 imposes several procedural safeguards before the disposition of an abandoned vessel. Specifically, section 526 requires the Respondent, inter alia, to appraise an abandoned vessel before destruction and send notice of removal within 48 hours of removal to the owner, legal owner

and any other person known to have an interest in the property. If the Respondent cannot find the registered or legal owner, it must publish notice of removal for at least two weeks in succession in one or more daily papers. (H&N code section 526.) Petitioners allege that the Respondent did not appraise the vessel, did not send notice of removal to all interested parties and did not, in the alternative, publish notice of removal in a daily paper.

However, in this case, Petitioners cannot show a failure to follow state or local ordinances because the provisions of the H&N code they point to do not bind the Respondent.

California Harbors and Navigation Code section 500 et seq. is commonly known as the "Boaters Lien Law" and provides procedures for parties holding possessory liens against boats to recover their interest by forcing a lien sale. (*See*, H&N code section 500 et seq.) Sections 522 and 526 of the Harbor and Navigation Code give public entities authority to dispose of abandoned vessels in accordance with the procedures provided therein. However, nothing in Sections 522 or 526, or elsewhere in the H&N code section 500 et seq., purports to limit a public entity's authority to dispose of boats taken into custody for other reasons, such as being in violation of federal, state and local law and regulations related to anchoring in the San Diego Bay's waterways.

Likewise, Respondent's code section 8.25 does not require the Respondent to conduct a lien sale for every registered boat impounded for some reason. Respondent's code section 8.25(4) addresses the

Respondent's authority to dispose of vessels and procedures as follows.

> If the owner or agent of any such vessel, watercraft or object cannot be found within Thirty (30) days, or refuses upon demand to pay the lawful costs and expenses as provided above, the District may sell the property at public auction after publication of sale is advertised in a newspaper of general circulation at least Five (5) days prior thereto, *or the District may keep, destroy, or otherwise dispose of such property*. (Emphasis added.)

The Respondent complied with it procedures as mandated in Respondent's code section 8.25. Moreover, on March 19, 2002, the Respondent, in response to a letter sent by the owner's agent, sent the agent a letter informing him that "the owner of the vessel may come and claim it at any time upon presentation of proof of ownership and after payment of all impound, towing, and storage fees incurred as of the date of retrieval."

Petitioners did not attempt to retrieve the vessel by paying the impound, towing and storage fees owned within thirty days, in fact several more months passed before the disposition of the vessel. Thus, the district court and Ninth Circuit properly found that the Respondent had authority to destroy the vessel.

IV.

CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

Duane E. Bennett, Port Attorney
San Diego Unified Port District
William D. McMinn, Deputy Port Attorney
Counsel of Record
Ellen Gross Miles, Deputy Port Attorney
3165 Pacific Highway
San Diego, CA 92101
(619) 686-6219

Counsel for Respondent